68

Supreme Court, U.S
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No.

In the Supreme Court of the United States

LARRY A. RANDLETT,

Petitioner,

v.

WARDEN OF ROSS CORRECTIONAL INSTITUTION, ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In Ohio, must a fact other than a prior conviction, necessary for an upward departure from a statutory maximum sentence be proved according to the procedures mandated by *Apprendi v. New Jersey*, 120 S.Ct 2348, which held that any fact, "if found exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the [guilty] verdict alone" must be proved beyond a reasonable doubt?

IMPACT. Defendant is one of tens of thousands who fall into the "black hole" of judicial decisions; this Court issued its ruling in *Blakely v. Washington*, 542 US 296, which reiterated and clarified the rule established in *Apprendi*, after defendant's state appeal process was considered final but before he commenced his Federal *Habeas Corpus* action. The state maintained that his right to appeal based on *Blakely* was not permitted due to non-retroactivity and the Federal Courts won't apply *Blakely* because it was not reviewed on direct appeal in the state courts.

CONFLICT. There is great inconsistency within the federal court system in the treatment of similar cases, meaning that citizen's rights vary based upon where they are tried. The Ohio courts' decisions and the District and Circuit courts' decisions conflict with:

SUPREME COURT - *Apprendi v. New Jersey*, 530 US 473, (a sentence may not be enhanced beyond statutory maximum by judge factfinding).

SUPREME COURT - *Blakely v. Washington*, 542 US 296, (statutory maximum is that sentence that may be imposed without judge factfinding).

SUPREME COURT - *Cunningham v. California* , ___ S.Ct ___, (any fact that exposes a defendant to a greater potential sentence must be found by a jury, and established beyond a reasonable doubt, not merely a preponderance).

NINTH CIRCUIT - *Kaua v. Frank*, 350 F Sup 2s 848, (since *Apprendi* was decided before sentence was final, habeas review allowed in light of clarification provided by *Blakely*)

2. Are out-of-court statements that are testimonial, including secret presentence reports and secret victim impact statements, barred under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses and challenge the veracity of reports, regardless of whether such statements are deemed reliable by the court?

IMPACT. This judicial cloak of secrecy affects every inmate thus sentenced in Ohio and thousands of inmates in other states featuring similar statutes where access to documents used in sentencing is prohibited.

CONFLICT. There is considerable inconsistency between the Federal Rules of Criminal Procedure designed to protect a defendant's rights and the statutes of Ohio. The decisions of the Ohio courts and the District and Circuit courts conflict with:

FIFTH CIRCUIT - *U.S. v. Carreon* , 1 F.3d 1225, (5th Cir. 1992) (court must disclose PSI to defendant).

SECOND CIRCUIT - *Gayle v. Mann*, 966 F.2d 81 (2d Cir. 1992) (*Habeas* granted to inmate who discovered false information in his PSI).

TENTH CIRCUIT - *U.S. v. Kiefer*, 198 F.3d 798, (10th Cir. 1999) (court may not satisfy its obligation by simply adopting PSI as its findings).

SIXTH CIRCUIT - *U.S. v. Mitchell*, 243 F.3d 953, (6th Cir. 2001) (remanding for resentencing because defendant never read PSI)

3. Are Constitutional rights preserved if defendant doesn't invoke the specific constitutional rule in the state appellate court, but does challenge the core element of the constitutional issue in his complaint or must the court evaluate the claim as plain error?

IMPACT. Clarification of the requirements for exhaustion of state remedies impacts every *habeas corpus* petitioner.

CONFLICT. There are conflicting rulings among the federal circuits in defining the preservation of rights for *habeas* review. The District and Circuit courts reviewing petitioner's *habeas* are in conflict with:

NINTH CIRCUIT - *U.S. v. Jordan*, 256 F.3d 922, (9th Cir. 2001) (due process requires *habeas* grant when standard of proof at sentencing creates plain error).

SIXTH CIRCUIT - *U.S. v. Stewart*, 306 F.3d 295 (6th Cir. 2002) (reviewing *Apprendi* challenge for plain error because substantial rights and fairness of proceedings affected)

NINTH CIRCUIT - *Hoffman v. Arave* , 236 F.3d 523, (9th Cir. 1984) (federal courts must reach underlying merits of constitutional claim in spite of state procedural rules).

LIST OF PARTIES

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgements below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at A-1 of this petition and is unpublished.

The opinion of the United States District Court appears at A-2 and is unpublished.

The opinion of the Ohio Supreme Court appears at A-13 of this petition and is unpublished.

The opinion of the Tenth Appellate District Court, Franklin County, Ohio, appears at A-14 of this petition and is unpublished.

The date on which the United States Court of Appeals decided my case was April 20, 2007.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him ..."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive a person of life, liberty or property, without due process of law."

The Ohio Revised Code 2929.14 (B) reads in relevant part:

> [I]f the offender previously has not served a prison term the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

The Ohio Revised Code 5145.01 reads in relevant part: "If a prisoner is sentenced to two or more separate felonies, the prisoner's term shall run as a concurrent sentence, except if consecutive sentences provisions of sections 2929.14 and 2929.41 of the Revised Code apply."

The Ohio Revised Code 2929.14 (E)(4) reads in relevant part:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds consecutive sentence is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court finds any of the following:
>
> > (a) The offender committed the multiple offenses while the offender was awaiting trial ...
> >
> > (b) The harm caused by the multiple offenses was so great or unusual ...
> >
> > (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public ...

STATEMENT OF THE CASE

Extracting findings from third-party hearsay testimony, a secret presentence investigation report, and secret victim impact statements, the trial court gave defendant a sentence enhanced beyond the statutory maximum based on a preponderance of evidence. At the time of the sentencing, this Court had ruled three years earlier in *Apprendi v. New Jersey*, 530 US 484, that the Sixth and Fourteenth Amendments prohibit courts from making their own findings to impose a sentence above the statutory maximum permitted by the "jury verdict alone." *Id.* at 490. Before petitioner had completed his appeal at the state level, this Court made clear in *Crawford v. Washington*, 124 S.Ct 1354, that the right of a defendant to be confronted by witnesses against him is a "bedrock procedural guarantee that applies to federal and state prosecution." *Id.* at 1359. Yet the state appellate court found no violation of defendant's constitutional rights and the Ohio Supreme Court found no constitutional issue.

While defendant was preparing his petition for federal relief under a writ of *Habeas Corpus*, this Court confirmed in *Blakely v. Washington*, 124 S.Ct 2531, that *Apprendi* specifically applied to a sentencing system identical to that under which defendant was sentenced. While the case at hand reflects many of the issues addressed in *Blakely*, defendant does not seek retroactive application of this decision.

Defendant is still in his initial appeal process having exhausted his state remedies and is now exercising his right to appeal to the United States Supreme Court for justice under a first writ of *Habeas Corpus*. Defendant does, however, seek the same consideration, fair treatment, and protection of rights afforded defendant Blakely.

1. On February 5, 2003, petitioner entered an Alford plea of guilty in the Franklin County, Ohio, Court of Common Pleas to multiple counts of gross sexual imposition, a felony in the third degree and a probational offense. The plea did not contain any elaboration regarding the circumstances surrounding the alleged offenses; petitioner merely acknowledged that, at trial, the state could probably prove the elements of the crime to which he was pleading. Under Ohio law, sentences presumptively run concurrent. See O.R.C. 5145.01.

2. During the sentencing hearing, the state introduced a California Sheriff's report that exonerated defendant from any crimes during the previous three years. But, the trial court, using out-of-context testimony, concluded petitioner was grooming future victims. Defense counsel objected to the introduction of third-party hearsay testimony but was overruled by the trial court. The judge later used this testimony to justify an enhanced sentence "to protect the public from future crimes by the offender."

3. In his defense, petitioner presented testimony from a court approved psychiatrist and petitioner's therapist of three years that petitioner was unlikely to reoffend and would respond well to continued therapy. The state presented no contradictory expert testimony.

4. Prior to the Alford plea, the state offered petitioner a plea agreement for a sentence of fifteen years. Petitioner rejected this offer after the trial court judge assured *in camera* that offender "would never see such a sentence."

5. Without hesitation or contemplation after completion of defense testimony, the trial court began rendering the sentence. The judge ruled that petitioner

was a threat to commit future crimes, had caused unusual harm, and had committed the worst form of the offense. Petitioner was sentenced to twenty years in prison and five years post release control. To support this upward departure of the sentence, the trial court cited allegations that were neither in the indictment, found by a jury, admitted to by defendant, or even presented in the court.

6. Petitioner had no opportunity to see his presentence investigation report, victim impact statements, or any document the court was using to find these enhancing factors.

7. Petitioner appealed *inter alia* that the enhanced sentence was contrary to statute as the trial court had no facts to support the sentence enhancing findings and that the trial court had admitted and used hearsay testimonial evidence to enhance defendant's sentence contrary to *Crawford*.

8. The Ohio Tenth Appellate District Court supported the actions of the trial court and affirmed petitioner's sentence.

9. Petitioner sought discretionary review of this decision in the Ohio Supreme Court. He argued *inter alia* that the procedures the trial court used in imposing the exceptional sentence contravened Ohio statutes and defendant's constitutional rights. The Ohio Supreme Court declined review.

10. The month following the Ohio Supreme Court decision not to review, this Court rendered its decision in *Blakely*.

11. Dissatisfied with the ineffectiveness of his

trial/appellate counsel for failing to raise *Apprendi,* petitioner fired his attorney and sought new counsel to pursue his *Habeas Corpus* Writ.

12. Petitioner's new representation timely filed a writ of *Habeas Corpus* on behalf of petitioner in the Southern Ohio District Federal Court, Western Division, and subsequently submitted a petition to the Tenth Appellate District Court of Ohio for a delayed reopening of appeal as permitted under Ohio Appellate Rule 26(B) arguing ineffective assistance of counsel and unconstitutional sentencing in accordance with *Apprendi/Blakely.*

13. Subsequent to the Ohio Supreme Court's denial of petitioner's appeal, while petitioner's *Habeas Corpus* was before the District Court, and six years after this Court's decision in *Apprendi,* the Ohio Supreme Court decided in *State v. Foster*, 845 NE 2d 470 (2006), that in light of *Apprendi* and *Blakely,* Ohio's sentencing scheme was unconstitutional but only for those still on direct appeal.

14. The Tenth Appellate District Court denied defendant's motion to reopen his appeal and the Ohio Supreme Court denied review.

15. The Southern Ohio District Court denied Petitioner's *Habeas Corpus* petition and the Sixth Circuit denied a certificate of appealability.

16. Petitioner petitions the Honorable Court for certiorari and justice.

OHIO'S SENTENCING REFORM ACT

Ohio Senate Bill 2 of 1996, colloquially known as the "truth in sentencing act", was a statutory enactment designed to replace the prior indeterminate sentencing law, where punishment was not always proportional to the severity of the offense. The Revised Code provides for determinate sentences within a range allowing for discretionary sentencing by the trial court based on the seriousness of the offense and whether the offender represents a threat of future crimes.

The Bill provides subject to no exceptions, that when a person is convicted of a felony previously had not served a prison term, the court shall impose the shortest prison term authorized for the offense unless the court finds aggravating factors that it feels justify an upward departure. [O.R.C. 2929.14 (B)]. Concurrent sentences are also presumptive as Senate Bill 2 mandates that sentences shall run concurrently unless the court finds enhancing factors required of O.R.C. 2929.14 (E)(4). [See O.R.C. 5145.01].

If the State decides to seek an exceptional sentence upward in a particular case, it need not make factual allegations supporting that request in the charging instrument. In fact, even if the state never requests an enhanced sentence at all, the trial judge is free to impose one *sua sponte* at sentencing. But, whether the state requests an exceptional sentence upward or the trial court raises it on its own, judges (not juries) find the aggravating facts supporting such heightened punishment. Without exception, in Ohio, judge-based factfinding is always made utilizing a preponderance of evidence.

SUMMARY OF ARGUMENT

I. The procedures in Ohio's Revised Code for finding aggravating facts necessary to impose an exceptional sentence upward violates the plain terms of the rule expressed by this Court in *Apprendi*, that any fact "if found exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the [guilty] verdict alone." 530 US 469, 483 (2000). Aggravating facts under Ohio's sentencing scheme have this precise effect. By finding such a fact, a sentencing judge may impose a sentence that is longer than that mandated as the statutory maximum for an offender who has never served a term in prison. This permits judges (not juries) to find aggravating facts by a preponderance of evidence (not beyond a reasonable doubt).

In petitioner's case, Ohio Revised Codes subjected him to a presumptive sentence of six months on each count served concurrently. The trial court, however, found aggravating facts alleging a more serious offense, a need to protect the public from future crime, and that defendant's conduct represented the worst form of the offense --- that enabled the court to impose a sentence of twenty years. In direct violation of *Apprendi*, these enhancing facts were neither pleaded in the information nor proved to a jury beyond a reasonable doubt.

The decision in *Apprendi* was designed to replace a system in which a judge, extracting findings from a presentence report compiled by a probation officer he hopes more likely got it right than got it wrong, balloons a defendant's sentence from six months to twenty years. Finally, *Apprendi* guarantees that someone accused of committing a crime be able to predict with certainty the punishment to which he is exposing himself by pleading

guilty. Yet, here, without any facts presented during the sentencing hearing, nor included in the indictment, nor admitted to by the defendant, the trial court judge engaged in his own factfinding to enhance defendant's sentence upward.

The central thrust of *Apprendi* is that it is wrong to convict someone of a crime and then sentence him as if he had committed a more serious offense. Enforcing the *Apprendi* rule here will ensure that Ohio courts may not increase a defendant's punishment based on allegedly aggravating facts that he did not have fair notice of nor was he allowed to contest.

II. Sensitive to the abuses of England's notorious Star Chamber that convicted and sentenced upon out-of-court testimonies, the Founding Fathers sought to protect the citizenry by incorporating into the Sixth Amendment guarantees that the accused had a right to confront all who would present testimony against him. Two hundred and twenty years later, Ohio statutes still provide trial courts the power to determine an offender's sentence using secret out-of-court testimony in the form of presentence reports and victim impact statements that defendant has no access to let alone the ability to cross-examine or challenge.

That is exactly what happened in petitioner's case. He was shocked to hear the trial court judge recite findings that had never been alleged in the indictment, presented in court as facts, or admitted to by the defendant and see these findings used as a basis to increase defendant's sentence beyond the statutory maximum.

Petitioner maintains that any out-of-court statement by any source that is testimonial and accepted

by the court to prove an element of the offense is barred unless the testifier is unavailable and defendant had prior opportunity to cross-examine or challenge facts regardless of whether such statements are deemed reliable. Confrontation is the only indicium of reliability sufficient to satisfy constitutional demands of the Sixth Amendment, otherwise we are operating under the tyranny of a Star Chamber.

III. The level of specificity required to preserve a constitutional right for appeal varies greatly among the state, district, and circuit courts. In the instant case, petitioner's appeal claim maintained that he was sentenced on a judge's findings that did not have any facts in support. Because, at the time of sentencing, the State of Ohio did not recognize the rule established in *Apprendi* as having application to its sentencing scheme, defense counsel did not make an *Apprendi* claim or use the words "due process" in the appeal. However, defense did address the core issue resolved in *Apprendi* that judge factfinding to enhance a sentence is unconstitutional.

Petitioner asserts that implicating a constitutional claim in appeal in a state judicial environment that does not recognize such claim at the time is substantial to preserve such an issue for review in a Habeas action and, at least should be reviewed for "plain error."

ARGUMENT

I. Ohio's Procedure For Imposing Exceptional Sentences Upward Contravene The Plain Terms Of The Apprendi Rule.

This case seeks the application of the rule expressed by this court in *Apprendi v. New Jersey*, 120 S. Ct. 2348, where this court held that any fact that subjects

a defendant to a longer sentence than that "prescribed by the legislature", or the "statutory limit[ ]", must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 2362-63 (2000). This holding conformed to the principle "by which history determined what facts were elements of crimes" - namely, any "fact ... legally essential to the punishment to be inflicted." *Harris v. United States*, 536 US 545, 561 (2002); see also *Apprendi* at 2365 ("common law understanding" was that "a fact that is by law the basis for imposing or increasing punishment is an element"); J. Bishop, *New Criminal Procedure* (2d ed. 1872) ("whatever in law is essential to the punishment to be inflicted is an element").

This court reaffirmed the *Apprendi* rule in *Ring v. Arizona*, 536 US 584 (2000), in which it invalidated Arizona's method for finding "aggravating facts" that subjected offenders to the death penalty. Any fact that a state deems necessary for an increase in a defendant's punishment, this court made clear, must be proved according to the procedures mandated by *Apprendi*. *Ring* at 588-589.

Ohio's statutory scheme under which petitioner was sentenced, suffers the same infirmities as the New Jersey and Arizona schemes that this court invalidated in *Apprendi*. Ohio's Revised Code 2929.14 (B) mandates that

> if the offender has not previously served a prison term, the court shall impose the shortest prison term authorized for the offense ... unless the court finds that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

In other words, just as in New Jersey and Arizona, the presence of an aggravating fact beyond the elements of the crime of conviction subjects the defendant to more severe punishment than otherwise is legally permissible. In Ohio, the court rather than a jury finds these facts and does so by a preponderance of evidence rather than beyond a reasonable doubt as found by a panel of his peers.

Never having served a prison sentence, the defendant in this case entered the court expecting the minimum sentence only to see it balloon to twenty years based not on facts proved to a jury or even evidence that could have been challenged in the sentencing hearing, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.

This procedure constitutes a paradigmatic *Apprendi* violation. The trial court judge, not a jury of peers, found the facts that increased defendant's sentence beyond the statutorily mandated minimum by a preponderance of evidence that the defendant was given no opportunity to challenge. The trial court's finding that the defendant's crime was such that it warranted a greater than minimum sentence and that the defendant was sure to commit a future offense and that an enhanced sentence was necessary to protect the public without submitting the issue to a jury is a classic violation of the *Apprendi* rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi* at 2362.

Despite the apparent clarity of the *Apprendi* infirmity in Ohio's sentencing scheme, Ohio courts

consistently ruled that *Apprendi* did not affect the "judicial discretion in sentencing a criminal defendant." *State v. Schmoll* , 839 NE 2d 995, 1000. That same decision further held that the judge finding the factors set forth in O.R.C. 2929.14 (B) did not "subject an offender to a prison term in excess of what the law provides as the maximum sentence". *Id.* at 1000. *Schmoll* concluded that "[a]ccordingly, a jury is not required to find factors set forth in O.R.C. 2929.14 (B) before a judge may impose a prison sentence". *Id.* at 1001.

This interpretation by Ohio courts reflects an earlier decision by the Ohio Supreme Court that "[c]ontrary to appellate assertion, *Apprendi* did not create a right to have each element of a crime charged proved beyond a reasonable doubt". *State v. Cejas*, 770 NE 2d 89 at 92. That the State of Ohio could come to a conclusion in such stark opposition to the clear wording in *Apprendi* is baffling. This Court, in its *Apprendi* decision left little doubt that a "[c]riminal defendant is entitled to a jury determination that he is guilty of every element of the crime with which he is charged beyond a reasonable doubt". *Apprendi* at 2355-56. But, the injustice of this interpretation is reflective of the system under which the defendant was sentenced. Then, again, this was the same court that declined to hear defendant's appeal because it "held no constitutional issues."

Ohio has tried to justify its sentencing system by simply saying that "statutory maximum" for an offense is that upper limit provided by statute. Constitutional protections as defined by *Apprendi*, however, are quite clear that the "statutory maximum" is that sentence that the statute allows without additional factfinding by the judge.

Apprendi holds that the decision at hand is not

one of form but of effect. If a State such as Ohio makes an increase in defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the state labels it – must be found beyond a reasonable doubt. See *Ring* at 602.

Ohio sentencing law is specific that for a first-time offender, a minimum sentence is mandated and concurrent sentences are presumptive unless facts are present that warrant an upward departure. There is no requirement that these facts be found by a judge. The state could have elected to have these facts presented to a jury and attempted to prove them beyond a reasonable doubt; the state could have included a concession of these facts in a plea; the state could have asked the defendant to waive his *Apprendi* rights. However, the state elected to pursue the one course of action that, though convenient, was constitutionally prohibited at the time of sentencing by allowing the judge to find the enhancing facts by a preponderance of evidence.

Even though Ohio may label the maximum sentence allowed for a specific level of felony the "statutory maximum", it does not make it so. In this regard, the Ohio sentencing scheme is identical to that of New Jersey and Arizona, in that each only permitted an upward movement in a sentence if aggravating factors were found and each unconstitutionally allowed those factors to be found by a preponderance of evidence.

Because Ohio sentencing law allows the court to deviate upward from the mandated minimum sentence dictated by the guilty plea alone if a single aggravating factor is found, the procedures for finding such a factor must comply with *Apprendi.*

By the plea agreement entered by the defendant

all charges against him were probational with, if a prison sentence were dictated by the court, six months incarceration. As such, the state could only make an upward departure if facts were found and the procedure for finding that fact had to conform to *Apprendi.* That the legislature had vested the power to find fact in the trial court does not abrogate the requirement of the state to conform to the constitutional protection that every element of the crime be found beyond a reasonable doubt.

The legislature of the State of Ohio threatened the defendant with minimum concurrent sentences if he committed the basic felony act as a first-time offender and additional punishment if it were proven that he was a continued threat to the community or that his conduct was so abnormally egregious to warrant additional time in prison. It also held that a defendant could only receive consecutive sentences if the crime represented the worst form of the offense. (See *State v. Comer*, 99 Ohio St 3d 463). Thus, we have a system in Ohio in which the largest portion of a defendant's sentence turns on the factual finding subject to the least constitutional protection.

The Ohio legislature has considerable discretion in defining crimes and their attendant punishment. They are free to determine which facts are essential to each specific punishment. But, here the legislature required the court to render a minimum sentence that could be enhanced only by violation of the defendant's constitutional rights.

Apprendi holds that such a situation (where a defendant "faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others") "it necessarily follows that the defendant should not be deprived of protections that have, until that point, unquestionably attached." 530 US

at 484. The Ohio exceptional sentence system unconstitutionally deprived the petitioner of these critical protections against an erroneous loss of liberty and an unwarranted additional stigma.

The unfairness of petitioner's sentencing procedure is underscored by the fact that not only did the judge engage in factfinding, but that he based his findings on information never presented in court and, therefore, never subject to challenge by petitioner. Such "star chamber" proceedings define how far afield judge-based factfinding has wandered from constitutional guarantees. The Sixth Amendment right of the accused to have a jury of his peers determine the truth "of every accusation" is designed in part to guard against arbitrary, biased, or eccentric judicial decisions. *Duncan v. Louisiana*, 391 US 145, 156 (1968).

The Due Process Clause requires the State to prove each element of a criminal offense beyond a reasonable doubt because "the interests of the defendant are of such magnitude" that they must be protected by a standard of proof "designed to exclude as nearly as possible the likelihood of erroneous judgement." *Addington v. Texas*, 441 US 418, 423 (1979); see also *In re Winship*, 397 US 358, 363-64 (1970). This latter case was very powerful in defense of the constitutional protections afforded a defendant in sentencing; holding that the beyond a reasonable doubt standard is a prime instrument for reducing the risk of conviction resting on factual error and that "a person accused of a crime ... would be at a serious disadvantage amounting to a lack of fundamental fairness if he could be adjudged and imprisoned for years on the strength of the same evidence that would suffice in a civil case." 397 US 363. But, that is exactly what happened in defendant's case. Petitioner was sentenced to twenty additional years in prison based

on facts that were found by a preponderance of evidence or perhaps even a lesser standard when the sitting judge made finding of fact without any supporting evidence presented in court. Under these circumstances, a jury surely might have found reasonable doubt as to whether defendant's was the worst form of the offense or that he was a candidate for recidivism.

The Ohio District Court's argument that defendant was not warranted relief because he was adjudicated by the Ohio State's definition of "statutory maximum" under *Apprendi* as defined and applied (although improperly) at the time. Furthermore, the court held that since all defendants at that time were treated to the same and equal definition, no relief was required. In other words, the defendant was sentenced unconstitutionally under the same unconstitutional interpretation of the law as all other defendants at the same time and therefore does not deserve the constitutional rights he should have received in the first place.

Justice in America should not be allocated by chance, but that is exactly what the Ohio Supreme Court has done. Waiting for six years to pass after the decision in *Apprendi* and a year-and-a-half after *Blakely*, 542 US 296 (2004), before finally acknowledging that the Ohio sentencing scheme that allowed judge factfinding was unconstitutional, the Ohio Supreme Court unfortunately held that relief was only available to those on direct appeal. (See *State v. Foster*, 845 NE 2d 470.)

Had the court made this decision in a timely manner after *Apprendi*, petitioner would not have suffered an unconstitutionally severe sentence; or if petitioner had drawn out his direct appeal until *Foster* was decided he would have received relief. However, as

chance would have it, the state court was tardy in its recognition of the rule established in *Apprendi* and, once decided, limited relief to those lucky enough to remain on direct appeal.

Defendant's case implicates *Apprendi's* core concern that someone accused of committing a crime have the "ability to predict with certainty the judgement from the face of the felony indictment." 530 US at 478. Under the facts alleged in petitioner's information and thus encompassed in his guilty plea, the longest sentence that Ohio law allows is six-months. But the trial court, with the state's compliance, imposed a sentence of twenty years, based upon facts the petitioner hotly disputed.

Enforcing the *Apprendi* rule here will give relief to Ohio defendants such as petitioner who were blind-sided by court imposed sentences longer than they could have predicted from the facts acknowledged in their guilty pleas.

II. Allowing Judicial Factfinding Invites Other Constitutional Abuses Such As Secret Testimony.

The use of secret testimony to convict or sentence a defendant has a long, cruel, and disturbing history. Sir Walter Raleigh was sentenced by secret testimony in the notorious Star Chamber and defendant in the instant cause was sentenced by secret testimony in a presentence investigation report and secret victim impact statements.

Defendant was denied access to these documents and could only surmise their contents based upon statements made by the trial court judge rendering a sentence obviously prepared prior to the sentencing hearing.

In spite of evidence provided by a state approved psychiatrist and defendant's therapist of three years that defendant was most unlikely to reoffend, the trial court judge relied on third-party hearsay evidence from a California Sheriff's report (which exonerated defendant of any wrong doing during the last three years) to conclude that defendant was "grooming" other victims and therefore represented a threat of future crimes that required an enhanced sentence to protect the public. Defendant's objection to the entering of third-party hearsay evidence was overruled.

When justifying further enhancements the trial court cited defendant's alleged conduct that could only have come from out-of-court testimonial statements since none of the allegations were presented in court to allow rebuttal. Yet, the Ohio sentencing statutes permitted the court to claim otherwise based on allegations defendant never had an opportunity to confront.

The result is a judicial system that is a defendant's worst nightmare, in which the court informs him that, not only is it going to enhance his sentence based on facts found by a preponderance of evidence, but those facts are to be derived from secret documents or third-party hearsay testimony that defendant has no opportunity to challenge or cross-examine.

This extraordinary abuse of constitutional rights was conducted in compliance with Ohio statutes and the support of numerous Ohio Appellate and Supreme Court decisions. Ohio courts have repeatedly held that "denying a defendant access to his presentence report and victim impact statement is not an abuse of the trial court's discretion nor does it deny defendant's due process." *State v. Bayless*, 448 NE 2d 511; *State v. Stern*, 484 NE 2d 255, *State v. Dietz*, 623 NE 2d 613.

Reliance on a document of dubious pedigree such as a PSI begs not only for application of the rule expressed in *Crawford v. Washington* , 124 S.Ct 1354 (2004), but *Apprendi* as well. If the ultimate goal of the Confrontation Clause, as provided for in the Sixth Amendment, is to ensure the reliability of evidence; that goal is thwarted by the Ohio sentencing scheme. Any system that allows a judge to color his decision based on uncontested out-of-court testimonial statements, contravenes a defendant's right to cross-examine witnesses regardless of whether such statements are deemed reliable by the court. *Crawford* at 1354.

Allowing a judge to make disputed finding of fact related to a defendant's past or future conduct and sentence enhancing factors, raises concerns underlying *Apprendi*; that the Sixth and Fourteenth Amendments guarantee a jury's standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase a potential sentence ceiling.

III. Petitioner's Constitutional Rights Were Preserved For *Habeas Corpus* Review.

Petitioner never waived any Constitutional rights and exhausted state remedies before pursuing *Habeas* relief. Two issues of Constitutional import were presented to the governing state appellate court and the Ohio Supreme Court: (1) Defendant's sentence was enhanced by judge factfinding of "facts" never presented in trial; (2) In enhancing defendant's sentence, the trial court relied on hearsay evidence. The appellate court denied relief, the Ohio Supreme Court declined review, and the Sixth Circuit Court of Appeals found no Constitutional issue presented.

In his direct appeal, defendant argued that during sentencing the trial judge had announced findings required of statutes to enhance a sentence without any supporting facts. The outcome was an upward departure representative of the most arrant perversion of the rule described in *Apprendi* that a "[j]udge's role in sentencing is constrained at its outer limits by facts alleged in an indictment and found by a jury." *Id.* at 2349. In the instant case none of the facts used by the trial judge were alleged in the indictment nor admitted to by the defendant. Defendant further asserted that the use of out-of-court testimony to satisfy the findings required to increase a sentence above the statutory maximum violated the Confrontation Clause. [Before the exhaustion of petitioner' s direct appeal in State Courts, this court issued its decision in *Crawford v. Washington*, which held that "out-of-court statements by witnesses that are testimonial and barred under the Confrontation Clause." *Id.* at 1354].

In the *Habeas* evaluation, the state argued (and the district court agreed) that petitioner's failure to invoke *Apprendi* by name forfeited the right to Constitutional relief. But, "the general rule of exhaustion is not rigid and inflexible." *Granberry v. Greer*, 481 US 129, 131, and though petitioner's objection on appeal was not the model of specificity, it did address the core principle of *Apprendi* that "[sentence enhancing] facts must be established beyond a reasonable doubt." *Id.* at 2363. More detailing in an appeal is not required because "due process protects a defendant's interest in fair sentencing". *U.S. v. Jordan*, 256 F.3d 923, (9th Cir. 2001). See also *U.S. v. Tisdale*, 248 F.3d 964, 975-76 (10th Cir. 2001).

When "fundamental rights are involved", the general rule that objections cannot be raised for the first

time on [a *Habeas* review], may be relaxed to prevent manifest injustice. *U.S. v. Al-Hamdi*, 356 F.3d 564, 568 n.4 (4th Cir. 2004). Sixth and Fourteenth Amendment violations certainly involve fundamental rights as reflected in the Sixth Circuit's own decision in *U.S. v. McDaniel*, 398 F.3d 540 (6th Cir. 2005), "that [any] sentencing error that leads to a violation of the Sixth Amendment by imposing a more severe sentence than is supported by a jury's verdict diminishes the fairness of the criminal sentencing and public reputation of the judicial system." To disallow petitioner's plaint because of something that amounts to a semantic slight would qualify as the "manifest injustice" referred to in *Al-Hamdi supra.*

Even if defendant's counsel had addressed *Apprendi* with explicity, the invocation of the remedy would have been futile as Ohio courts had repeatedly dismissed similar claims. [See *State v. Cejas*, (review denied by Ohio Supreme Court), and *State v. Schmoll*, (review denied by Ohio Supreme Court)]. When a State Supreme Court or intermediate state appellate court consistently rejects a particular claim, the state remedy is considered inadequate and statutory exemption is granted from exhausting "ineffective" state corrective processes. [28 USC §2254(b)(1)(B)(ii) (2000)] *Blackledge v. Perry*, 417 US 21, 23-4 (1974). [See also *Nix v. Whiteside*, 475 US 1, 3 (1986); *Duckworth v. Serrano*, 454 US 1, 3 (1981)]. Thus it was reasonable for the defense to abandon pursuit of any *Apprendi* assignment of error since Ohio courts had previously and repeatedly rejected this claim in other cases.

The intent of the exhaustion principle has been to insure that state courts have an opportunity to consider an issue before it is ruled upon in *Habeas* proceedings. Petitioner's counsel provided state appellate and

Supreme Courts a second more specific complaint regarding *Apprendi* to review when he petitioned for a reopening of his appeal under Ohio Rules of Appellate Court 26(B). But these courts declined to hear the petition.

If the argument were sustained that petitioner had failed to preserve his *Apprendi* objection, it could only be considered a forfeiture and not a "waiver of rights" as there were never any "intentional relinquishment or abandonment of a known right. *U.S. v. Olano*, 507 US 725, 733 (1993), and, in accordance with Federal Criminal Rule of Procedure 52(B), "a plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Based on their decision in *U.S. v. McDaniel* , the Sixth Circuit should have recognized the plain error present in the instant case and reviewed accordingly. *Apprendi* claims are routinely reviewed for plain error when a petitioner fails to object in a lower court to the use of the preponderance of evidence standard when the enhancing facts must be found beyond a reasonable doubt. *U.S. v. Stewart*, 306 F.3d 295, 312-13 (2002). [See also *U.S. v. Joyner*, 313 F.3d 40, 45 (2d Cir. 2002).]

In fact, the same Sixth Circuit who saw no constitutional issue held in *U.S. v. Burgin*, 388 F.3d 177, that "[i]n order to preserve an *Apprendi* challenge, the defendant need not utter the words 'due process' as long as it is well known that they dispute the district court's findings." This is exactly what petitioner did in state courts and thus preserved his *Apprendi* challenge.

While defendant was still on direct appeal at the state level, this Court issued its decision in *Crawford v. Washington*. (March 8, 2004). It is accepted judicial practice that if "the law changes while a case is on

appeal, the appellate court must apply the new rule." *Richardson v. U.S.*, 379 F.3d 485, 487 (7th Cir. 2004) [See also *Hamling v. U.S.*, 418 US 87, 102 (1974) (holding that claim not precluded on appeal by failure to raise objection at trial, because intervening Supreme Court decision changed the law while appeal was pending)].

From the context of his original appeal, to the re-opening of his appeal, including all the intervening changes in law resulting from Supreme Court decisions, even the most casual judicial observer would conclude that petitioner had preserved his rights.

CONCLUSION

Petitioner seeks the same justice this Honorable Court granted defendants Ring in Arizona, Blakely in Washington, and Cunningham in California, based on the rule expressed by this Court in *Apprendi* that was very clear: judges may not find the facts necessary for the upward departure of a sentence.

Ohio was slow to listen to this Court. Even after *Ring v. Arizona* and *Blakely v. Washington*, Ohio waited until 2006 to recognize their sentencing system instituted in 1996 was unconstitutional.

As a result, defendants such as petitioner were denied sentencing under a constitutional system and denied relief because they were no longer on direct appeal when the state finally admitted their sentencing infirmity. Until now this court has not been asked to address this question - but it is certainly certworthy.

This Honorable Court is also asked for the first time to review the procedure used in Ohio to sentence a defendant on information and testimonies made

out-of-court in presentence investigations and victim impact statements never shown to defendant. This methodology conflicts sharply with Federal procedures which require a defendant to have his presentence report thirty two days prior to the sentencing hearing. [Federal Criminal Rule 32].

Finally, petitioner asks this Court to distinguish with clarity to the states and lower courts what is required to preserve a constitutional error for *Habeas* review, a concept that creates conflict in the decisions of several circuit courts, even among the differing panels of same circuit.

Thus, petitioner brings before this Honorable Court three certworthy questions representing egregious constitutional violations that affect thousands of inmates in all fifty states. Petitioner prays that in the interest of justice, this petition for a writ of certiorari will be granted.

Respectfully submitted,

Larry A. Randlett, *pro se*
P.O. Box 7010
Chillicothe, OH 45601

10 June 2007

No. 06-4001
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[DATE STAMP]
FILED
APR 20 2007
LEONARD GREEN, Clerk

LARRY A. RANDLETT,
Petitioner-Appellant,

v. ORDER

PAT HURLEY, Warden, Ross Correctional Institution,
Respondent-Appellee.

Larry A. Randlett, an Ohio prisoner proceeding through counsel, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Randlett requests a certificate of appealability pursuant to Fed. R. App. P. 22(b).

A certificate of appealability may issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Upon review, the court concludes that Randlett has failed to make such a showing. The application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

[CERTIFICATION STAMP]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY RANDLETT
Petitioner,

v.

CASE NO. 2:05-cv-466
JUDGE FROST
MAGISTRATE JUDGE ABEL

PAT HURLEY, Warden,
Respondent.

OPINION AND ORDER

On February 10, 2006, final judgment was entered dismissing petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter is now before the Court on petitioner's February 6, 2006, motion for relief from judgment, and his February 20, 2006, objections to the Magistrate Judge's *Report and Recommendation*. For the reasons that follow, petitioner's request for reconsideration of the denial of his request for a stay is DENIED; however, his request to file Objections to the *Report and Recommendation* is GRANTED. The February 10, 2006, final judgment dismissing petitioner's §2254 petition without consideration of petitioner's objections is VACATED. Petitioner's objections are OVERRULED. The *Report and Recommendation* is ADOPTED and AFFIRMED, and this case is hereby DISMISSED.

On January 12, 2006, the Magistrate Judge issued a *Report and Recommendation* recommending dismissal of petitioner's habeas corpus petition. Doc. No. 13. Petitioner thereafter filed a request for extension of time

until February 6, 2006, to file objections to the *Report and Recommendation*, which request was unopposed and was granted. Doc. Nos. 14, 15. On February 6, 2006, instead of filing objections to the *Report and Recommendation*, petitioner requested a stay of proceedings so that he could exhaust his claim of ineffective assistance of appellate counsel by filing a delayed application to reopen the appeal in the state courts. Doc. No. 16. Petitioner's request for a stay of proceedings was denied, and the *Report and Recommendation* was adopted and affirmed. Doc. No. 17.

Petitioner now requests that this Court reconsider the denial of his request for a stay of proceedings. In support of such request, petitioner again argues that he was denied the effective assistance of appellate counsel when his attorney failed to raise on appeal an issue that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as that case has been defined under *Blakely v. Washington*, 542 U.S. 296 (2004), and that a stay of proceedings therefore is appropriate. *See Rhines v. Weber,* 125 S.Ct. 1528, 1534 (2005)("[D]istrict court would abuse its discretion if it were to grant ... a stay when ... unexhausted claims are plainly meritless.")

As an initial matter, although petitioner again argues in support of his motion for reconsideration that his ineffective assistance of appellate counsel claim is meritorious, it appears that the Court has jurisdiction to consider petitioner's request for reconsideration of the denial of his request for a stay under *Gonzalez v. Crosby*, 125 S.Ct 2641(2005). In *Gonzalez v. Crosby*, the United States Supreme Court held:

> Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction--even claims couched in the

language of a true Rule 60(b) motion--circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. § 2244(b)(2). The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated: even assuming that reliance on a new factual predicate causes that motion to escape § 2244(b)(1)'s prohibition of claims "presented in a prior application," § 2244(b)(2)(B) requires a more convincing factual showing than does Rule 60(b). Likewise, a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent § 2244(b)(2)(A)'s dictate that the only new law on which a successive petition may rely is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In addition to the substantive conflict with AEDPA standards, in each of these three examples use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar. §2244(b)(3).

In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief, as in *Harris, supra*, will of course qualify. A motion can also be said to bring a "claim" if

> it attacks the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.

Id., at 2648 (footnote omitted). Nonetheless, and assuming that this Court has jurisdiction to consider petitioner's request for reconsideration of the denial of the request for a stay of proceedings, for the reasons discussed in this Court's *Order*, February 10, 2006, such request is DENIED.

Petitioner also requests the Court permit him to file objections to the *Report and Recommendation.* Although petitioner does not indicate the reason for his failure to previously raise any objections to the *Report and Recommendation*, he does state that his actions are not intentionally "dilatory in nature." *See Motion for Relief from Judgment.* Petitioner's request to file objections is unopposed and is GRANTED. Final judgment vacating dismissing petitioner's §2254 petition without consideration of petitioner's objections is VACATED; however for the reasons that follow, petitioner's objections are OVERRULED.

Petitioner objects to the Magistrate Judge's recommendation that claim one, in which he asserts that his sentence violates *Blakely v. Washington*, 542 U.S. at 296 (2004), be dismissed because he failed to fairly

present such claim to the state courts. Petitioner again contends that he preserved his *Blakely* claim for federal habeas corpus review despite his failure to raise any federal constitutional issue regarding his sentence on direct appeal,[1] under *United States v. Strayhorn* , 250 F.3d 462 (6th Cir. 2001), *overruled on other grounds by United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002). Petitioner's argument is not well taken.

Strayhorn, supra, involved a sentence imposed prior to the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On direct appeal, the United States Court of Appeals for the Sixth Circuit held that the defendant had adequately preserved his *Apprendi* claim by

> repeatedly objecting to the drug quantity determination at his plea hearing and at his sentencing hearing, as well as in a written objection to the calculation of his base offense level in his presentence report. Although he did not utter the words "due

---

[1]Petitioner raised the following assignments of error regarding his sentence on direct appeal:

> 1. The trial court's imposition of consecutive sentences on defendant was not supported by the required findings pursuant to Revised Code 2929.14(B)(4) or the evidence and was error.
>
> 2. The trial court's imposition of sentence of more than the statutory minimum was not supported by the required findings pursuant to Revised Code 2929.14(B) or the evidence and was error.
>
> Exhibit I to Return of Writ. As noted by the Magistrate Judge, petitioner concedes that he neither cited to the federal Constitution, federal case law, nor any state cases employing constitutional analysis in the state courts. *Traverse*, at 3.

> process" at either of these hearings, he made it well known that he disputed the district court's factual finding with respect to drug quantity.

United States v. Strayhorn, supra , 250 F.3d at 467. *United States v. Stines,* 313 F.3d 912 (6th Cir. 2002). also referred to by respondent, likewise involved sentences imposed pre-*Apprendi.* On direct appeal, the Sixth Circuit Court of Appeals held that defendants did not waive *Apprendi* challenges to drug quantity determinations because "[i]t would have been impossible for the defendants to have intentionally relinquished or abandoned their *Apprendi* claims considering *Apprendi* was decided after they were sentenced." *Id.*, at 917.

Such are not the circumstances here. Petitioner was sentenced via judgment entries issued on April 3, 2003,[2] long after the Supreme Court's June 26, 2000, decision in *Apprendi.* Thus, even assuming that petitioner's *Blakely* claim was before this Court in the context of direct review, as was the scenario in *Strayhorn* and *Stines, supra,* it appears that petitioner would have forfeited all but plain error review of that claim. *See United States v. McDaniel,* 398 F.3d 540, 546-47 (6th Cir. 2005), *United States v. Lopez,* 309 F.3d 966, 969 (6th Cir. 2002), citing *United States v. Stewart,* 306 F.3d 295 (2002)(distinguishing *Strayhorn* as a pre-*Apprendi* sentence). Further, federal habeas petitioners are required to fairly present federal constitutional claims to the state courts before obtaining federal habeas corpus review. *See Picard v. Connor,* 404 U.S. 270, 275 (1971); *Anderson v. Harless,* 459 U.S. 4, 6 (1982); *Sampson v. Love,* 782 F.2d 53, 55 (6th Cir. 1986); *Haggins v. Warden,*

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[2]Petitioner's sentencing hearing was held on on March 31. 2003.

715 F.2d 1050, 1054 (6th Cir. 1993); *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir, 1993). Contrary to petitioner's allegation here, nothing in petitioner's appellate brief would have alerted the state appellate court that he intended to raise any federal constitutional issue regarding his sentence. *State v. Elkins*, 148 Ohio App.3d 370 (Ohio App.3d 2002), also referred to by petitioner, does not alter this conclusion. In *Elkins*, the defendant expressly referred to *Apprendi v. New Jersey, supra*, in arguing that he was unconstitutionally sentenced and that Ohio's sentencing scheme was facially unconstitutional. *See id.*, at 374-376. Petitioner failed to do so. Petitioner argued only that the trial court's "generalized references to statutory provisions" did not satisfy the mandate of O.R.C. §2929.14(E) requiring factual findings prior to the imposition of consecutive sentences and that the trial court's imposition of more than the minimum statutory sentence was not supported by the requisite factual findings under 2929.14(B). *See* Exhibit I to Return of Writ.

Petitioner also objects to the Magistrate Judge's recommendation that his claim of ineffective assistance of appellate counsel for failure to raise a *Blakely* claim on appeal be dismissed as without merit. Petitioner again argues that while *Blakely* was not decided until long after petitioner's sentence was affirmed by the state appellate court on December 18, 2003, appellate counsel failed to recognize and raise his valid claim under *Apprendi v. New Jersey, supra* and he was thereby denied the effective assistance of counsel. *Objections*, at 5-6. Petitioner again refers to *State v. Elkins, supra*, in support of his argument. Petitioner's argument fails.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),

> the defendant pleaded guilty to second-degree possession of a firearm for an unlawful purpose, which carried a prison term of 5-to-10 years. Thereafter, the trial court found that his conduct had violated New Jersey's "hate crime" law because it was racially motivated, and imposed a 12- year sentence.

United States v. Booker , 543 U.S. 220, 230 (2005). The Supreme Court set aside the sentence, holding:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted. to a jury, and proved beyond a reasonable doubt.

Id., citing Apprendi v. New Jersey, supra, 530 U.S. at 490.

> In *Blakely*, the Supreme Court reversed a sentence imposed under the State of Washington's determinate sentencing scheme after finding the trial judge had enhanced the defendant's kidnaping sentence beyond the statutory maximum based upon his own finding, by a preponderance of the evidence, the defendant had acted with "deliberate cruelty," 124 S.Ct. at 2537-38. In doing so, the Supreme Court reiterated its previous holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

> doubt," *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct 2348, 2362-63, 147 L.Ed.2d 435 (2000), but clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S.Ct. at 2537 (emphasis in original).

United States v. Bucheit , 134 Fed.Appx. 842, unpublished, 2005 Fed.App. 0431N (6 th Cir. May 23, 2005).

As discussed in the Magistrate Judge's *Report and Recommendation*, petitioner was sentenced within the prescribed statutory maximum term for his offenses of conviction. Thus, the record simply fails to reflect that his sentence violated *Apprendi* as that case had been interpreted at the time of petitioner's appeal. *See United States v. Fitch*, 282 F.3d 364, 368 (6 th Cir. 2002), citing *United States v. Corrado,* 227 F.3d 528, 542 (6th Cir. 2000). Regardless of whether "*Apprendi* issues [were] being litigated regularly prior to petitioner's direct appeal," *Objections*, at 7, appellate counsel therefore was not unreasonable in failing to raise an *Apprendi* or *Blakely* claim on direct appeal. *United States v. Burgess*, 142 Fed.Appx.232, unpublished, 2005 Fed.App. 0531N (6th Cir, June 22, 2005); *Conley v. United States*, 2005 WL 1420843 (W.D. Mich. June 15, 2005). Again, *Elkins*, does not support petitioner's argument that appellate counsel should have foreseen that. Apprendi is violated when a judge, rather than a jury makes findings that increase a defendant's sentence beyond the statutory minimum. *See Objections*, at 7. Elkins challenged the trial court's determination, after a jury trial, that he was a major drug offender. Elkins "classification as a major drug

offender ... vested the trial court with the discretion to impose an additional prison term upon specific findings concerning recidivism and the seriousness of his conduct. *See* R.C. 2925.11(C)(1)(e)." *Elkins, supra* , 148 Ohio App.3d at 597. The state appellate court rejected, Elkins' *Apprendi* claim. *Id.*

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted a *de novo* review of those portions of the *Report and Recommendation* objected to by petitioner. For all of the foregoing reasons, and for the reasons discussed at length in the Magistrate Judge's *Report and Recommendation* , petitioner's objections are OVERRULED.

Petitioner's request for reconsideration of the denial of his request for a stay is DENIED; his request to file Objections to the *Report and Recommendation* is GRANTED. The February 10, 2006, final judgment dismissing petitioner's §2254 petition without consideration of petitioner's objections is VACATED. Petitioner's objections are OVERRULED. The *Report and Recommendation* is ADOPTED and AFFIRMED, and this case is hereby DISMISSED.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Larry Randlett

vs

Case No. C2-05-466

Pat Hurley, Warden

Judge Frost
Magistrate Judge Abel

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court, The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court this action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that Petitioner's request for reconsideration of the denial of his request for a stay is DENIED; his request to file Objections to the *Report and Recommendation* is GRANTED. The February 10, 2006 final judgment is VACATED. Petitioner's objections are OVERRULED. The *Report and Recommendation* is ADOPTED and AFFIRMED and this case is DISMISSED.

Date: June 29, 2006

James Bonini, Clerk
/s/ Scott Miller
By Scott Miller /Deputy Clerk

The Supreme Court of Ohio

[DATE STAMP]
FILED
AUG 02 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio

Case No. 06-1001

v.

E N TRY

Larry A. Randlett

Upon consideration of the jurisdictional memoranda filed in this case, the Court dismisses the appeal as not involving any substantial constitutional question.

(Franklin County Court of Appeals; Nos. 03AP385, 03AP386, 03AP387, and 03AP388)

/s/
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO
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[DATE STAMP]
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CLERK OF COURTS

State of Ohio,
Plaintiff-Appellee,

v.

Larry Randlett,
Defendant-Appellant.

No. 03AP-385
(C.P.C. No. 01CR-02-705)
No. 03AP-3856
(C.P.C. No. 01CR-03-1738)
No. 03AP-3857
(C.P.C. No. 01CR-08-4353)
No. 03AP-388
(C.P.C. No. 01CR-03-1721)
(REGULAR CALENDAR)

OPINION

Rendered on December 18, 2003

Ron O'Brien, Prosecuting Attorney, and *Laura M. Rayce*, for appellee.

Tyack, Blackmore & Liston Co., L.P.A., and *Thomas M. Tyack*, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Larry A. Randlett, appeals from judgments of the Franklin County Court of

Common Pleas finding him guilty, pursuant to defendant's guilty pleas, of multiple counts of gross sexual imposition in violation of R.C. 2907.05, corruption of a minor in violation of R.C. 2901.04, disseminating materials harmful to a juvenile in violation of R.C. 2901.31, and sexual battery in violation of R.C. 2901.03.

{¶2} According to the facts presented in connection with defendant's guilty pleas, the charges arose out of defendant's molestation of five teenage boys. In August 2000, defendant returned from California, where he had been living for about a year, to visit the W. family. He had befriended two teenage boys in the family, J.W. and K.W. K.W.'s friend, B.P., was with them the day of defendant's visit; J.W. was in college.

{¶3} Defendant apparently was working for a racing team at the time, so defendant and the boys went to Mid-Ohio during the day. They returned that evening to the W. residence. K.W. and B.P. were in K.W.'s room with defendant, where defendant was showing them a computer program on aviation. K.W. was called downstairs to the telephone to speak to his brother, J.W., leaving B.P. alone in the room with defendant.

{¶4} A few moments later, K.W.'s mother came upstairs, opened the door, and observed defendant kissing B.P., who was at the time 14 or 15 years of age. "Defendant was on his knees next to [B.P.] who was sitting at a computer chair." (Tr. 34.) When confronted, defendant agreed he had a problem and swore it was the first time anything like that had happened; he stated he was seeking help the following week when he returned to California. The next day, K.W. and his mother met with B.P.'s mother to discuss the situation.

{¶5} After B.P. talked to his mother, they went to

the Hilliard Police Department, and an investigation was begun. B.P. revealed a number of instances of abuse that occurred between June and October of the prior year (case No. 01CR-02-705; Franklin App. No. 03AP-385). B.P. stated he met defendant at baseball tryouts in middle school, where defendant would show up with vintage sports cars, a 1960's Cobra, a Mustang, and a Ferrari. When the boys came to look at the cars, defendant started passing out gifts and talking to them.

{¶6} In June of that defendant asked the boys to come over to wash one of the cars, agreeing to give them $20. B.P. stated that when they were done washing the cars, defendant fondled B.P.'s penis; that was the beginning of the abuse. About a month, later, B.P. went back to defendant's home, where defendant masturbated B.P. The activity culminated in October 1999 with defendant having oral sex with B.P. in defendant's hotel room.

{¶7} The Hilliard detective also interviewed K.W. and his brother J.W. (case No. 01CR-08-4353; Franklin App. No. 03AP-387). J.W. met defendant in 1996, while he was a student at Hilliard Middle School. Defendant came to a soccer game, pulled up in a nice sports car, and started passing out gifts. Defendant would get the boys racing jackets and book bags related to his work with Team Rahal. Defendant's activity at the middle school led to the summer of 1997, when J.W. was at defendant's house doing odd jobs for him. Defendant wanted to weigh J.W., but defendant stated he needed J.W. to be naked; J.W. complied. Defendant weighed J.W. a second time without clothes, but in the second weighing defendant measured J.W.'s penis. The activities led to defendant's masturbating J.W., to mutual-masturbation, and later to forced oral sex. According to the state, both J.W. and K. W. received extravagant gifts from defendant worth

thousands and thousands of dollars, plus hours of free flying lessons, trips to Malibu Go Cart Racing, dinner, and cash.

{¶8} The Hilliard detective also interviewed J.W.'s younger brother, K.W. K.W. met defendant through J.W. in the fall of 1996 and developed a relationship with defendant in which defendant took him go-carting. K.W.'s activities with defendant led to defendant asking K.W. to try on a pilot's suit; defendant told the boys he had been a pilot in the Air Force and had flown an F-16 fighter plane. As K.W. was naked, changing clothes, defendant began to hug and kiss K.W. Defendant progressed to more touching, to showing K.W. pornographic movies and to defendant's masturbating K.W. In fact, when K.W.'s family was away for work trips or conventions, K.W. would stay with defendant, where defendant abused K.W., with mutual masturbation and forced oral sex.

{¶9} According to the state, when the indictments on J.W. and K.W. were released to the press, the Hilliard detective received phone calls from additional people, the first being T.R. (case No. 02CR-03-1721; Franklin App. No. 03AP-388). A student at Hilliard Middle School, T.R. met defendant at a soccer game in the fall of 1993. At the conclusion of the game, defendant pulled his car out onto the field and popped open the trunk; he gave T.R. a ride a few practices later. The abuse with T.R. began with defendant's wanting to check T.R. for a hernia, reaching down into T.R.'s pants and fondling and masturbating T.R. The activity progressed to mutual masturbation, oral sex, and defendant's buying alcoholic beverages for T.R. Even though T.R. was under the age of 16, T.R. was allowed to drive defendant's cars whenever he chose. When T.R. was with defendant, T.R. was permitted to view pornography and drink, and defendant gave T.R. large sums of money that T.R. used to buy cocaine. By the

summer of 1995, defendant took T.R. to a car show in Cincinnati, at which point he had anal sex with 15-year-old T.R. According to T.R., defendant had anal sex with T.R. between 25 and 30 times.

{¶10} Lastly, B.D. came forward (case No. 02CR-03-1738; Franklin App. No. 03AP-386). B.D.'s father worked with defendant at Team Rahal, and when B.D. came to work with his father, defendant took an interest in B.D. According to B.D., the abuse began in June 1994, when he showered at defendant's apartment. Defendant walked in naked, had an erection, and attempted to kiss B.D. A short time later, B.D. was in one of defendant's cars, when defendant fondled him. The activity progressed to watching pornography in defendant's house with mutual masturbation. B.D. remembers February 7, 1996, his fourteenth birthday, because defendant engaged in fondling, masturbation, and oral sex with B.D. that day. B.D. reported that, in March 1996, defendant kissed, masturbated, and digitally penetrated him.

{¶11} As a result of the investigation the Hilliard detective conducted, an indictment filed February 2, 2001, in case No. 01CR-02-705 (Franklin App. No. 03AP385), charged defendant with ten counts, some with a specification, as follows:

Count 1:	Gross Sexual Imposition
Count 2:	Gross Sexual Imposition
Count 3:	Gross Sexual Imposition
Count 4:	Gross Sexual Imposition
Count 5:	Rape
Count 6:	Rape
Count 7:	Sexual Battery
Count 8:	Sexual Battery
Count 9:	Gross Sexual Imposition

Count 10: Gross Sexual Imposition

{¶12} By indictment filed August 1, 2001, in case No. 01CR-08-4353 (Franklin App. No. 03AP-387), defendant was charged, some with a specification, as follows:

Count 1:	Gross Sexual Imposition
Count 2:	Gross Sexual Imposition
Count 3:	Gross Sexual Imposition
Count 4:	Rape
Count 5:	Corruption Of A Minor
Count 6:	Rape
Count 7:	Corruption Of A Minor
Count 8:	Disseminating Matter Harmful To Juveniles
Count 9:	Disseminating Matter Harmful To Juveniles
Count 10:	Gross Sexual Imposition
Count 11:	Gross Sexual Imposition
Count 12:	Gross Sexual Imposition
Count 13:	Gross Sexual Imposition
Count 14:	Gross Sexual Imposition
Count 15:	Gross Sexual Imposition
Count 16:	Rape
Count 17:	Gross Sexual Imposition
Count 18:	Rape
Count 19:	Corruption Of A Minor
Count 20:	Rape
Count 21:	Corruption Of A Minor
Count 22:	Rape
Count 23:	Corruption, Of A Minor
Count 24:	Rape
Count 25:	Corruption Of A Minor
Count 26:	Gross Sexual Imposition
Count 27:	Gross Sexual Imposition
Count 28:	Gross Sexual Imposition

Count 29:	Gross Sexual Imposition
Count 30:	Gross Sexual Imposition
Count 31:	Gross Sexual Imposition
Count 32:	Disseminating Matter Harmful To Juveniles
Count 33:	Disseminating Matter Harmful To Juveniles
Count 34:	Disseminating Matter Harmful To Juveniles
Count 35:	Disseminating Matter Harmful To Juveniles
Count 36:	Endangering Children

{¶13} By indictment filed March 28, 2002, in case No. 02CR-03-1721 (Franklin App. No. 03AP-388), defendant was charged, some with a specification, with the following:

Count 1:	Gross Sexual Imposition
Count 2:	Gross Sexual Imposition
Count 3:	Gross Sexual Imposition
Count 4:	Rape
Count 5:	Corruption Of A Minor
Count 6:	Rape
Count 7:	Corruption Of A Minor
Count 8:	Rape
Count 9:	Corruption Of A Minor
Count 10:	Rape
Count 11:	Corruption Of A Minor
Count 12:	Rape
Count 13:	Corruption Of A Minor
Count 14:	Rape
Count 15:	Corruption Of A Minor
Count 16:	Rape
Count 17:	Corruption Of A Minor
Count 18:	Rape
Count 19:	Corruption Of A Minor

Count 20:	Rape
Count 21:	Corruption Of A Minor
Count 22:	Rape
Count 23:	Corruption Of A Minor
Count 24:	Rape
Count 25:	Corruption Of A Minor
Count 26:	Rape
Count 27:	Corruption Of A Minor
Count 28:	Rape
Count 29:	Corruption Of A Minor
Count 30:	Rape
Count 31:	Corruption Of A Minor
Count 32:	Rape
Count 33:	Corruption Of A Minor
Count 34:	Rape
Count 35:	Corruption Of A Minor
Count 36:	Rape
Count 37:	Corruption Of A Minor
Count 38:	Endangering Children
Count 39:	Endangering Children
Count 40:	Endangering Children

{¶14} Lastly, by indictment filed March 29, 2002, in case No. 02CR-03-1738 (Franklin App. No. 03AP-386), defendant was charged with the following:

Count 1:	Kidnapping
Count 2:	Gross Sexual Imposition
Count 3:	Gross Sexual Imposition
Count 4:	Kidnapping
Count 5:	Gross Sexual Imposition
Count 6:	Kidnapping
Count 7:	Gross Sexual Imposition
Count 8:	Kidnapping
Count 9:	Gross Sexual Imposition
Count 10:	Gross Sexual Imposition
Count 11:	Disseminating Matter Harmful To

	Juveniles
Count 12:	Kidnapping
Count 13:	Gross Sexual Imposition
Count 14:	Kidnapping
Count 15:	Rape
Count 16:	Corruption Of A Minor
Count 17:	Kidnapping
Count 18:	Gross Sexual Imposition
Count 19:	Gross Sexual Imposition
Count 20:	Felonious Sexual Penetration
Count 21:	Endangering Children
Count 22:	Kidnapping
Count 23:	Gross Sexual Imposition
Count 24:	Kidnapping
Count 25:	Gross Sexual Imposition
Count 26:	Gross Sexual Imposition
Count 27:	Kidnapping
Count 28:	Gross Sexual Imposition
Count 29:	Gross Sexual Imposition

{¶15} Although defendant originally entered not guilty pleas to all counts, on February 11, 2002, defendant changed his not guilty pleas to guilty pleas on some of the charges; the state nolled the remaining counts. Specifically, in case No. 01 CR-02-705 (Franklin App. No. 03AP-385), defendant entered guilty pleas to the following: Counts 1 through 4 – Gross Sexual Imposition, felonies of the fourth degree, Counts 7 and 8 – Sexual Battery, felonies of the third degree, and Counts 9 and 10 – Gross Sexual Imposition, felonies of the fourth degree.

{¶16} In case No. 01CR-08-4353 (Franklin App. No. 03AP-387), defendant entered guilty pleas to the following: Counts 1 through 3 – Gross Sexual Imposition, felonies of the fourth degree, Counts 5 and 7 – Corruption, of a Minor, felonies of the fourth degree, Count 8 – Disseminating Matter Harmful to Juveniles,

felony of the fifth degree, Counts 10 through 15 – Gross Sexual Imposition, felonies of the third degree, Count 17 Gross Sexual Imposition, a felony of the third degree, Counts 19, 21, 23, and 25 – Corruption of a Minor, felonies of the fourth degree, Counts 26 through 31 – Gross Sexual Imposition, felonies of the fourth degree, 32 – Disseminating Materials Harmful to Juveniles, a felony of the fourth degree, and Count 34 – Disseminating Materials Harmful to Juveniles, a felony of the fifth degree.

{¶17} In case No: 02CR-03-1721 (Franklin App. No. 03AP-388), defendant entered guilty pleas to the following: Counts 1, 2, and 3 – Gross Sexual Imposition, felonies of the fourth degree, Counts 5, 7, 9, 11, 13, 15, 17, and 19 – Corruption of a Minor, felonies of the third degree, all of which were to be. sentenced under the law as it existed prior to Am.Sub.S.B. No.2 ("S.B. 2"). In addition, defendant entered guilty pleas to Counts 21, 23, 25, 27, 28, 31, 33, 35, and 37 – nine counts of Corruption of a Minor, felonies of the fourth degree, all to be sentenced under the law as enacted through S.B. 2 and any pertinent amendments to it.

{¶18} In, case No. 02CR-03-1738 (Franklin App.-No. 03AP-386), defendant entered guilty pleas to the following: Counts 2, ~, 5, 7, 25, and 2~alt Gross Sexual Imposition, felonies of the third degree, Counts 9, 10, 13, 18, 19, 23, 28, and 29-all Gross Sexual Imposition. felonies of the fourth degree, and Count 16-Corruption of a Minor, a felony of the third degree.

{¶19} The trial court requested a pre-sentence investigation and set the matter for a sentencing and sexual predator hearing, which the trial court held on March 31, 2003. By judgment entries filed April 3, 2003, the trial court sentenced defendant to a total of 20 years

of imprisonment.

{¶20} Defendant appeals, assigning the following errors:

> I. THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES ON DEFENDANT WAS NOT SUPPORTED BY THE REQUIRED FINDINGS PURSUANT TO REVISED CODE 2929.14(E)(4) OR THE EVIDENCE AND WAS ERROR.
>
> II. THE TRIAL COURT'S IMPOSITION OF SENTENCE OF MORE THAN THE STATUTORY MINIMUM WAS NOT SUPPORTED BY THE REQUIRED FINDINGS PURSUANT TO REVISED CODE 2929.14(B) OR THE EVIDENCE AND WAS ERROR.
>
> III. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT TO BE A SEXUAL PREDATOR AS THE STATE DID NOT ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANT WAS LIKELY TO ENGAGE IN THE FUTURE IN THE COMMISSION OF ONE OR MORE SEXUALLY ORIENTED OFFENSES.
>
> IV. THE TRIAL COURT ERRED IN FILING A JUDGMENT ENTRY IN 01CR-705 THAT IMPOSED A GREATER SENTENCE THAN THAT PRONOUNCED AT THE SENTENCING HEARING.
>
> V. THE TRIAL COURT ERRED IN FILING A JUDGMENT ENTRY IN 02CR-1738 THAT IMPOSED A GREATER SENTENCE THAT [sic]

THAN PRONOUNCED AT THE SENTENCING HEARING.

VI. THE TRIAL COURT DEPRIVED THE DEFENDANT OF DUE PROCESS WHEN IT UTILIZED AND RELIED ON VICTIM IMPACT STATEMENTS THAT WERE NOT MADE AVAILABLE TO DEFENDANT OR HIS COUNSEL PRIOR TO OR AT THE TIME OF SENTENCING.

{¶21} Defendant's first two assignments of error are interrelated; because they both challenge the trial court's sentencing procedures, we address them together. In his first assignment of error, defendant asserts the trial court failed to make the requisite findings and state the necessary reasons to support sentencing him to serve consecutive sentences. In the second assignment of error, defendant contends the trial court failed to state the necessary findings to support sentencing him to more than the statutory minimum, as defendant never before had served a prison term.

{¶22} R.C. 2929.14(E) has been amended numerous times during the course of defendant's conduct encompassed in the indictments. Defendant, however, points to the following statutory language in support of his first assignment of error:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not

disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.19(B)(2) provides:

The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

* * *

> (c) If it imposes consecutive sentences under section 2929.14 of the Revised Code, its reasons for imposing the consecutive sentences[.]

{¶23} Accordingly not only must the trial court specify its findings from among those described in former R.C. 2929.14(E)(4), formerly R.C. 2929.14(E)(3), but it must also specify one of the findings set forth in former R.C. 2929.14(E)(4)(a), (b) and (c), formerly R.C. 2929.14(E)(3)(a), (b), and (c). Further, the court must set forth its reasons in support of those findings pursuant to R.C. 2929.19(B)(2)(c).

{¶24} In accordance with R.C. 2929.14(E)(4), the trial court found that consecutive sentences were necessary to protect the public and to punish the offender. The court further determined that consecutive sentences were, not disproportionate to the offense and the harm done. Finally, the trial court concluded under R.C. 2929.14(E)(4)(b) that the "harm is so great and unusual here that a single term of prison does not adequately reflect the seriousness of the Defendant's conduct." (Tr. 244.) Accordingly, the trial court complied with the requirements of R.C. 2929.14(E)(4); it made the necessary findings to support consecutive sentences. In compliance with R.C. 2929.19(B)(2)(c), the trial court stated its reasons for making those findings:

> Again, I have to cite, five separate and distinct victims, multiple counts, multiple offenses against each, young teenage boys. Predatory scheme over seven years, only stopped when caught. Abused trust, creating great psychological harm, and it's been a life-altering experience in a negative way for each of the victims.

(Tr. 244.) Moreover. the evidence amply supports the trial court's findings and reasons. According to the facts presented in connection with defendant's guilty pleas, he methodically seduced and molested five teenage boys on multiple occasions over an extended period of time.

{¶25} Pursuant to former R.C. 2929.14(B) and State v. Edmonson (1999), 86 Ohio St.3d 324, 326, in order to impose more than a minimum sentence for someone who has not served a prison term, the trial court must find either that the shortest prison term would demean the seriousness of the conduct, or that the public would not be adequately protected from future crimes of the offender or others. The trial court is not required to state the reasons for its findings under the circumstances former R.C. 2929.14(B) encompasses.

{¶26} In accordance with former R.C. 2929.14(B), the trial court determined that "the shortest sentence would demean the seriousness of the offenses and would not adequately protect the public." (Tr. 243.) Because the statutory sentencing scheme does not require the trial court to state the reasons for its findings under the circumstances prescribed in R.C. 2929.14(B), the trial court would not have erred in failing to state its reasons.

{¶27} Nonetheless, the trial court, throughout the sentencing, explained its reasons and denoted the egregious aspects of defendant's conduct. including the victims' ages, and the psychological harm defendant inflicted on each of the victims. In addition, the trial court noted defendant's occupation at Rahal Racing, his access to all the "hot stuff" attractive to teenage boys, and his flying background, all of which defendant used to entrap the victims into the activities he proposed.

{¶28} Given the foregoing, the trial court

adequately complied with the requirements of former R.C. 2929.14(B) and R.C. 2929.14(E). Moreover, the trial court met the requirements of R.C. 2929.19(B)(2)(c) as it relates to R.C. 2929.14(E)(4). Accordingly, defendant's first and second assignments of error are overruled.

{¶29} Defendant's third assignment of error asserts the trial court erred in finding him to be a sexual predator, defendant contends the record demonstrates he is not likely to re-offend. Defendant relies heavily on the testimony of his two witnesses, David J. Tennenbaum, Ph.D., and Teresa Decrescenzo, M.S.W. Because each expressed an opinion that defendant is not likely to re-offend, defendant contends the trial court's determination is not supported by the requisite dear and convincing evidence.

{¶30} Sexual predator determinations have been held to be civil in nature. See *State v. Newton* (June 11, 1998), Franklin App, No. 97APA10-1353. The standard for assessing the manifest weight of the evidence in a civil case is whether the judgment is "supported by competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280-281.

{¶31} When presented with a manifest weight argument in a criminal case, we engage in a limited weighing of the evidence to determine whether the judgment is supported by sufficient competent, credible evidence to permit reasonable minds to so conclude. *State v. Thompkins* (1997), 78 Ohio St.3d 380. 388; *State v. Conley* (Dec. 16, 1993), Franklin App. No. 93AP-387. In either the civil or the criminal analysis, determinations of credibility and weight of the evidence remain within the province of the trier of fact. See, e.g., *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

Whether we apply the civil or criminal test for assessing the manifest weight of the evidence, the result here is the same.

{¶32} In order for defendant to be designated a sexual predator, the state was required to prove by clear and convincing evidence not only that defendant had been convicted of, or pleaded guilty to, committing a sexually oriented offense, but also that defendant is likely to engage in the future in one or more sexually oriented offenses. Former R.C. 2950.01(E)(1) and former R.C. 2950.09(B)(3); *State v. Eppinger* (2001), 91 Ohio St.3d 158, 161. Defendant does not dispute that sexually oriented offenses are involved in this case. Rather, defendant contends the state failed to present clear and convincing evidence that defendant is likely to commit other sexually oriented offenses, and the evidence is therefore insufficient to establish that defendant is a sexual predator.

> {¶33} Clear-and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.

Eppinger at 164, quoting *Cross v. Ledford* (1954), 161 Ohio St.469, 477.

{¶34} The purpose of R.C. Chapter 2950 is to protect the safety and general welfare of the people of this state. Former R.C. 2950.02{B); *Eppinger* at 165. Former R.C. 2950.09(B)(2) required the trial court to consider all

relevant factors in making a sexual predator determination, including those enumerated in the statute. *Eppinger* at 166; *State v. Maser* (Apr. 20, 1999), Franklin App. No. 98AP-689. No requisite number of factors must be applicable before a defendant is found to be a sexual predator, and the trial court may place as much or as little weight on any of the factors as it deems to be appropriate. *State v. Austin* (Nov. 2, 2000), Franklin App. No. 00AP-184; *Maser*, supra. Even one or two statutory factors will suffice as long as the evidence of likely recidivism is clear and convincing. *State v. Hardie* (2001), 141 Ohio App.3d 1, 5.

{¶35} Defendant was born in 1947. At the time of these offenses, defendant was primarily in his late 40's and early 50's. He was aware of the tender age of the teenage boys who became his victims and he should have matured to the point of knowing the wrongfulness of his conduct. See former R.C. 2950.09(B)(2)(a). By contrast, the victims in this case were young boys, ages 11 to 18. See former R.C. 2950.09(B)(2)(c). Further, defendant provided alcohol to at least one victim, to the point of alcohol poisoning. See former R.C. 2950.09(B)(2)(e).

{¶36} The trial court further observed that defendant had multiple victims. See former R.C. 2950.09(B)(2)(d). indeed, noting Ms. Decrescenzo's testimony that "the more events and the more victims equal greater likelihood to re-offend," (Tr. 216) the trial court stated that here "[w]e have five victims in 67 or 68 counts, offenses that he pled guilty to." *Id.*

{¶37} While defendant had no prior criminal history, the trial court was inclined to look at the seven-year course of events at issue as prior offenses that simply were indicted and resolved at the same time. The trial court did not err by viewing the totality of

defendant's course of action, as, even if the earlier events do not constitute prior convictions, they demonstrate a pattern of abuse over numerous years. See R.C. 2950.09(B)(2)(h). As the trial court explained, defendant enticed young teenage boys into his presence and under his influence, and then, after achieving a level of trust with them. he broke the trust with clear sexual acts in multiple events over many years, "a factor weighing in favor of a predator finding." See former R.C. 2950.09(B){2)(j).

{¶38} Despite the multiplicity of offenses, the age of the boys involved, and the duplicity with which defendant enticed the boys into his influence, defendant continues to suggest he is not a sexual predator, because he has acknowledged his offenses and is in treatment. Indeed, both Dr. Tennenbaum and Ms. Decrescenzo opined that defendant was not likely to re-offend. The trial court, however, is not required to believe the testimony of defendant's witnesses when, as in this case, the record provides reasons for the trial court's discounting their testimony. Here, the trial court explained at length why it found their testimony unpersuasive.

{¶39} For example. the court noted that Dr. Tennenbaum found defendant to be a pedophile by definition, and Ms. Decrescenzo opined that pedophiles have a high likelihood of recidivism. Ms. Decrescenzo. however, contended defendant is not a pedophile, but an ephebophile. Although Ms. Decrescenzo attempted to explain the difference between the two categories, the trial court concluded "no significant definition was given." (Tr. 213.)

{¶40} The trial court also noted that the testimony of both witnesses was "in a great deal fact driven, and not

all the facts seemed to have been before them, or at least in many ways were put before them incompletely." (Tr. 212.) Indeed, the trial court observed that the person responsible for writing the pre-sentence investigation had several conversations with Ms. Decrescenzo and highlighted in the pre-sentence report that Ms. Decrescenzo found it significant that defendant had been absolutely forthright and truthful. Testimony at the hearing, however, revealed Ms. Decrescenzo was unaware of defendant's anal rapes of the victims.

{¶41} Lastly, the trial court pointed out that neither of the witnesses addressed the factors the legislature specifically had directed the court to consider in former R.C. 2950.09(B)(2). Based on those factors, the trial court concluded defendant is likely to reoffend. As additional support, the trial court further noted that after defendant's arrest, an investigation was conducted of defendant's activities when he resided in California prior to his arrest. The investigation revealed that the adult residents of his neighborhood had concerns because defendant was "spending a lot of time with kids in the age range of 13 to 14 years of age, and they forwarded that information voluntarily to the investigators, who then subsequently made contact with these individuals and their families." (Tr. 58.) The activities involved expensive gifts, racing memorabilia, flying memorabilia, t-shirts, and included activities such as young men helping with miscellaneous chores around the house, cleaning cars. and waxing cars. No criminal charges arose out of the investigation, but the "grooming process" defendant used in California was virtually identical to that he had employed in Ohio. In Ohio, the process always led to sexual abuse. The court again viewed it as a factor in the continuing pattern of abuse defendant demonstrated.

{¶42} Given the substantial evidence of

defendant's activities, continuing at or around the time of some of the indictments at issue in this appeal and after his treatment had begun, the trial court did not err in finding clear and convincing evidence that defendant is a sexual predator. Defendant's third assignment of error is overruled.

{¶43} Defendant's fourth and fifth assignments of error assert the trial court's sentence in some of its judgment entries varies from that pronounced in open court during the sentencing hearing. Specifically, defendant contends in his fourth assignment of error, that in case No. 01CR-02-705, the trial court imposed one-year sentences for Counts 1, 2, 3, 4, 9 and 10; as to Counts 7 and 8, the court imposed a three-year sentence on each count and then stated "[t]hese counts will run concurrent with each other in this case. There's a three-year sentence with respect to that case." (Tr. 245.) The Judgment Entry, however, provides that Counts 1, 2, 3, 4, 9, 10 and 7 are to be served concurrently, and Count 8 is to be served consecutively to all other counts and the other three cases. As a result, the trial court's judgment entry imposes six years, or double the sentence the trial court imposed at the sentencing hearing.

{¶44} Similarly, defendant's fifth assignment of error asserts that in case No. 02CR-03-1738, the, court imposed one and one-half year sentences on Counts 2, 3, 5, 7, 25, 26 and 16, and further stated "Count 2 and 3 will be consecutive, the rest win be concurrent. * * * There, is a three-year sentence with respect to that case." (Tr, 247.) By contrast, the Judgment Entry stated that "Counts Two and Three are to run consecutive with each other, with all other counts, and further, consecutive with Case Nos. 01CR-4353, 02CR-1721 and 01CR-705." (April 3, 2003 Judgment Entry.) As defendant notes, the Judgment Entry imposes four and one-half years as the

total sentence on that case, rather than the three years the court imposed at the sentencing hearing.

{¶45} The state properly concedes the trial court erred in varying the judgment entries in the noted cases from the sentences imposed at the sentencing hearing. Defendant's fourth and fifth assignments of error are sustained, and the judgment of the trial court is modified to reflect the sentences imposed at the sentencing hearing.

{¶46} Defendant's sixth assignment of error asserts the trial court deprived him of due process by relying on victim impact statements that were not made available to defendant or his counsel at the sentencing hearing.

{¶47} The victim impact statements were first mentioned on March 31, 2003, the day of the sentencing and sexual predator hearing. At that time, the court noted that a pre-sentence investigation had been ordered, and the court had reviewed it. The court then inquired whether counsel had had an opportunity to see and review the presentence investigation. Counsel for defendant responded that "as is typically the case, I was given the opportunity to review, I was not given access to the impact statements nor, of course, the recommendation for the Court, but as far as the guts of the report, I have seen it and have reviewed it." (Tr. 49.)

{¶48} At the conclusion of the state's evidence, the state sought the admission of exhibits, including the pre-sentence investigation. Defense counsel inquired whether the investigation included the victim impact statements and the recommendations of the probation department. Although the court indicated that its version did, the state said its exhibit did not. Defense counsel

responded, "'[c]ause I've not seen any of that stuff." (Tr. 73.) The report was then admitted into evidence without objection. The witness statements came up later, when defense counsel again indicated he had not seen them. At the time of sentencing, the court referenced the victim impact statements. Defendant did not object to the court's relying on them as part of the sentencing procedure.

{¶49} R.C. 2947.051 (C) provides that "[a] victim impact statement prepared under this section shall be kept confidential and is not a public record * * *. However, the court may furnish copies of the statement to both the defendant or the defendant's counsel and the prosecuting attorney." One appellate district has rejected an argument similar to defendant's contentions and has determined a defendant is not denied due process or equal protection when a court exercises its discretion to deny the defendant access to victim impact statements. *State v. Stewart*, 149 Ohio App.3d 1, 6, 2002-Ohio-4124. We, however, need not reach that issue, as defendant's failure to object to the trial court's use of victim impact statements requires a plain error review. Because this record does not demonstrate plain error, defendant's contentions are not persuasive.

{¶50} Specifically, Crim.R. 52(B) provides that [p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, the Ohio Supreme Court recently noted that

> [b]y its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain.

> To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

(Citations omitted.)

> Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court 'may' notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'

Id., quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶51} During the course of sentencing, the trial court stated, "[s]o with all of these impacts in mind, the Court believes the sentencing – the Court considers the impacts on the victims under 2929.11 is significant." (Tr. 241.) Before so concluding, however, the trial court listed those aspects of the victim impact statements it believed to be significant and noted,

> I have gone through the notes of the victim impact statements, made my own notes from them, just noticed such things, [B.P.]

> stating, who's now 17, 14 to 15 when these happened, nightmares, grades dropped from three point to 1.7, college plans got altered and changed, antidepressant meds counseling for both [B.P.] and his mother, substance abuse problems.

(Tr. 240)

{¶52} Similarly, as to another victim, the trial court stated

> [K.W.] has the – has tried counseling and believed it was successful, had to move to father from mother, believes that all of this has been brought upon him by Defendant's conduct, feels very strongly about it. Sold prescription drugs, was expelled from school. * * * [K.W.] said he's lost the ability to trust people

(Tr. 240, 241.) As to J.W., the court stated "it destroyed his family relationships. * * * Those things are very deep and significant victim impacts." (Tr. 241.)

{¶53} In a related vein, the trial court observed that T.R.'s relationship with defendant

> * * * was a life-altering relationship, dropped out of high school. actually – or got, kicked out of high school as a result, turned to drugs, fear of bringing forth these events, shame of them, received incredible gifts from the Defendant as part of inducement to stay in the relationship. And as clearly stated, he will never be over it.

(Tr. 240-241.) Similarly, as to B.D., the trial court stated B.D. "listed all the ways in which the Defendant induced him into the relationships. And he didn't tell his father because he was afraid that his father would go to prison for taking his vengeance out on the Defendant." *Id.*

{¶54} At that point, the trial court stated "[s]o with all those impacts in mind, the Court believes the sentencing – the Court considers the impacts on the victims under 2929.11 is significant." *Id.* Because the trial court placed on the record those aspects of the victim impact statements on which it relied to impose its sentence, the court in effect advised defendant of the content of the statements, and it further gave defendant the opportunity to respond, if appropriate. As a result, defendant was not sentenced on the basis of victim impact statements whose content was unknown to him. Thus, the record does not reveal plain error arising from defendant's contentions that he was denied due process because he did not view the victim impact statements the trial court considered in sentencing defendant. Defendant's sixth assignment of error is overruled.

{¶55} Having overruled defendant's first, second, third, and sixth assignments of error, and having sustained his fourth and fifth assignments of error as noted, we affirm the judgments of the trial court, as modified to reflect the sentences the trial court imposed at the sentencing hearing in case Nos. 01CR-02-705 and 02CR-03-1738. As a result, in case No. 01CR-02-705, Counts 7 and 8 will be served concurrently with each other, producing a three-year sentence in that case. Similarly, in case No. 02CR-03-1738, Counts 2 and 3 are to be served consecutively, and the remaining sentences are to be served concurrently, resulting in a three-year sentence in that case as well. With those modifications, the judgments of the trial court are affirmed as modified.

Judgments affirmed as modified.

PETREE, P.J., and SADLER, J., concur.

Supreme Court, U.S.
FILED
JUL 16 2007
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(2)

No. 07-448

In the Supreme Court of the United States

LARRY A. RANDLETT,

Petitioner,

v.

WARDEN OF ROSS CORRECTIONAL INSTITUTION, ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY RANDLETT
Petitioner,

v.

CASE NO. 2:05-cv-466
JUDGE FROST
MAGISTRATE JUDGE ABEL

PAT HURLEY, Warden,
Respondent.

REPORT AND RECOMMENDATION

Petitioner, a state prisoner, brings the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter is before the Court on the instant petition, respondent's return of writ, petitioner's traverse, and the exhibits of the parties.

This case involves petitioner's February 2002 convictions pursuant to his guilty plea in the Franklin County Court of Common Pleas on gross sexual imposition, sexual battery, corruption of a minor and disseminating matters harmful to a juvenile. Petitioner asserts in this federal habeas corpus petition that his sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004), that he was denied the effective assistance of appellate counsel due to his attorney's failure to raise such issue on appeal, and that he was denied due process and his right to confront witnesses when the trial court considered

victim impact statements, and statements made to the probation office and police in sentencing petitioner. For the reasons that follow, the Magistrate Judge concludes that petitioner's claims are either procedurally defaulted or without merit and **RECOMMENDS** that this action be **DISMISSED**.

I. FACTS and PROCEDURAL HISTORY

The facts and procedural are summarized by the Tenth District Court of Appeals as follows:

> Larry A. Randlett, appeals from judgments of the Franklin County Court of Common Pleas finding him guilty pursuant to defendant's guilty pleas, of multiple counts of gross sexual imposition in violation of R.C. 2907.05, corruption of a minor in violation of R.C. 2907.04, disseminating materials harmful to a juvenile in violation of R.C. 2907.31, and sexual battery in violation of R.C. 2907.03.
>
> According to the facts presented in connection with defendant's guilty pleas, the charges arose out of defendant's molestation of five teenage boys. In August 2000, defendant returned from California, where he had been living for about a year, to visit the W. family. He had befriended two teenage boys in the family, J.W. and K.W. K.W.'s friend, B.P., was with them the day of

defendant's visit; J.W. was in college.

Defendant apparently was working for a racing team at the time, so defendant and the boys went to Mid-Ohio during the day. They returned that evening to the W. residence. K.W. and B.P. were in K.W.'s room with defendant, where defendant was showing them a computer program on aviation. K.W. was called downstairs to the telephone to speak to his brother, J.W., leaving B.P. alone in the room with defendant.

A few moments later. K.W.'s mother came upstairs, opened the door, and observed defendant kissing B.P., who was at the time 14 or 15 years of age. "Defendant was on his knees next to [B.P.] who was sitting at a computer chair." (Tr. 34.) When confronted, defendant agreed he had a problem and swore it was the first time anything like that had happened; he stated he was seeking help the following week when he returned to California. The next day, K.W. and his mother met with B.P.'s mother to discuss the situation.

After B.P. talked to his mother, they went to the Hilliard Police Department, and an investigation was begun. B.P. revealed a number of instances of abuse that occurred between June and October

of the prior year (case No. 01CR-02-705; Franklin App. No. 03AP-385). B.P. stated he met defendant at baseball tryouts in middle school, where defendant would show up with vintage sports cars, a 1960's Cobra, a Mustang, and a Ferrari. When the boys came to look at the cars, defendant started passing out gifts and talking to them.

In June of that year, defendant asked the boys to come over to wash one of the cars, agreeing to give them $20. B.P. stated that when they were done washing the cars, defendant fondled B.P.'s penis; that was the beginning of the abuse. About a month later, B.P. went back to defendant's home, where defendant masturbated B.P. The activity culminated in October 1999 with defendant having oral sex with B.P. in defendant's hotel room.

The Hilliard detective also interviewed K.W. and his brother J.W. (case No. 01CR-08-4353; Franklin App. No. 03AP-387). J.W. met defendant in 1996, while he was a student at Hilliard Middle School. Defendant came to a soccer game, pulled up in a nice sports car, and started passing out gifts. Defendant would get the boys racing jackets and book bags related to his work with Team Rahal. Defendant's activity at the middle school

led to the summer of 1997, when J.W. was at defendant's house doing odd jobs for him. Defendant wanted to weigh J.W., but defendant stated he needed J.W. to be naked; J.W. complied. Defendant weighed J.W. a second time without clothes, but in the second weighing defendant measured J.W.'s penis. The activities led to defendant's masturbating J.W., to mutual masturbation, and later to forced oral sex. According to the state, both J.W. and K.W. received extravagant gifts from defendant worth thousands and thousands of dollars, plus hours of free flying lessons, trips to Malibu Go Cart Racing, dinner, and cash.

The Hilliard detective also interviewed J.W.'s younger brother, K.W. K.W. met defendant through J.W. in the fall of 1996 and developed a relationship with defendant in which defendant took him go-carting. K.W.'s activities with defendant led to defendant asking K.W. to try on a pilot's' suit; defendant told the boys he had been a pilot in the Air Force and had flown an F-16 fighter plane. As K.W. was naked, changing clothes, defendant began to hug and kiss K.W. Defendant progressed to more touching, to showing K.W. pornographic movies and to defendant's masturbating K.W. In fact, when K.W.'s family was away for work trips or conventions, K.W. would

stay with defendant, where defendant abused K.W. with mutual masturbation and forced oral sex.

According to the state, when the indictments on J.W. and K.W. were released to the press, the Hilliard detective received phone calls from additional people, the first being T.R. (case No. 02CR-03-1721; Franklin App. No. 03AP-388). A student at Hilliard Middle School, T.R. met defendant at a soccer game in the fall of 1993. At the conclusion of the game, defendant pulled his car out onto the field and popped open the trunk; he gave T.R. a ride a few practices later. The abuse with T.R. began with defendant's wanting to check T.R. for a hernia, reaching down into T.R.'s pants and fondling and masturbating T.R. The activity progressed to mutual masturbation, oral sex, and defendant's buying alcoholic beverages for T.R. Even though T.R. was under the age of 16, T.R. was allowed to drive defendant's cars whenever he chose. When T.R. was with defendant, T.R. was permitted to view pornography and drink, and defendant gave T.R. large sums of money that T.R. used to buy cocaine. By the summer of 1995, defendant took T.R. to a car show in Cincinnati, at which point he had anal sex with 15-year-old T.R. According to

T.R., defendant had anal sex with T.R. between 25 and 30 times.

Lastly, B.D. came forward (case No 02CR-03-1138; Franklin App. No. 03AP-386). B.D.'s father worked with defendant at Team Rahal, and when B.D. came to work with his father, defendant took an interest in B.D. According to B.D., the abuse began in June 1994, when he showered at defendant's apartment. Defendant walked in naked, had an erection. and attempted to kiss B.D. A short time later, B.D. was in one of defendant's cars, when defendant fondled him. The activity progressed to watching pornography in defendant's house with mutual masturbation. B.D. remembers February 7, 1996, his fourteenth birthday, because defendant engaged in fondling, masturbation, and oral sex with B.D. that day. B.D. reported that, in March 1996, defendant kissed, masturbated, and digitally penetrated him.

As a result of the investigation the Hilliard detective conducted, an indictment filed February 2, 2001, in case No. 01CR-02-705 (Franklin App. No. 03AP-385), charged defendant with ten counts, some with a specification, as follows:

Count 1: Gross Sexual Imposition
Count 2: Gross Sexual Imposition
Count 3: Gross Sexual Imposition
Count 4: Gross Sexual Imposition
Count 5: Rape
Count 6: Rape
Count 7: Sexual Battery
Count 8: Sexual Battery
Count 9: Gross Sexual Imposition
Count 10: Gross Sexual Imposition

By indictment filed August 1, 2001, in case No. 01CR-08-4353 (Franklin App. No. 03AP-387), defendant was charged, some with a specification, as follows:

Count 1: Gross Sexual Imposition
Count 2: Gross Sexual Imposition
Count 3: Gross Sexual Imposition
Count 4: Rape
Count 5: Corruption Of A Minor
Count 6: Rape
Count 7: Corruption Of A Minor
Count 8: Disseminating Matter Harmful To Juveniles
Count 9: Disseminating Matter Harmful To Juveniles
Count 10: Gross Sexual Imposition
Count 11: Gross Sexual Imposition
Count 12: Gross Sexual Imposition
Count 13: Gross Sexual Imposition
Count 14: Gross Sexual Imposition
Count 15: Gross Sexual Imposition
Count 16: Rape

Count 17: Gross Sexual Imposition
Count 18: Rape
Count 19: Corruption Of A Minor
Count 20: Rape
Count 21: Corruption Of A Minor
Count 22: Rape
Count 23: Corruption Of A Minor
Count 24: Rape
Count 25: Corruption Of A Minor
Count 26: Gross Sexual Imposition
Count 21: Gross Sexual Imposition
Count 28: Gross Sexual Imposition
Count 29: Gross Sexual Imposition
Count 30: Gross Sexual Imposition
Count 31: Gross Sexual Imposition
Count 32: Disseminating Matter Harmful To Juveniles
Count 33: Disseminating Matter Harmful To Juveniles
Count 34: Disseminating Matter Harmful To Juveniles
Count 35: Disseminating Matter Harmful To Juveniles
Count 36: Endangering Children

By indictment filed March 28, 2002, in case No. 02CR-03-1721 (Franklin App. No. 03AP-388), defendant was charged, some with a specification, with the following:

Count 1: Gross Sexual Imposition
Count 2: Gross Sexual Imposition
Count 3: Gross Sexual Imposition

Count 4: Rape
Count 5: Corruption Of A Minor
Count 6: Rape
Count 7: Corruption Of A Minor
Count 8: Rape
Count 9: Corruption Of A Minor
Count 10: Rape
Count 11: Corruption Of A Minor
Count 12: Rape
Count 13: Corruption Of A Minor
Count 14: Rape
Count 15: Corruption Of A Minor
Count 16: Rape
Count 17: Corruption Of A Minor
Count 18: Rape
Count 19: Corruption Of A Minor
Count 20: Rape
Count 21: Corruption Of A Minor
Count 22: Rape
Count 23: Corruption Of A Minor
Count 24: Rape
Count 25: Corruption Of A Minor
Count 26: Rape
Count 27: Corruption Of A Minor
Count 28: Rape
Count 29: Corruption Of A Minor
Count 30: Rape
Count 31: Corruption Of A Minor
Count 32: Rape
Count 33: Corruption Of A Minor
Count 34: Rape
Count 35: Corruption Of A Minor
Count 36: Rape
Count 37: Corruption Of A Minor

Count 38: Endangering Children
Count 39: Endangering Children
Count 40: Endangering Children

Lastly, by indictment filed March 29, 2002, in case No. 02CR-03-1738 (Franklin App. No. 03AP-386), defendant was charged with the following:

Count 1: Kidnapping
Count 2: Gross Sexual Imposition
Count 3: Gross Sexual Imposition
Count 4: Kidnapping
Count 5: Gross Sexual Imposition
Count 6: Kidnapping
Count 7: Gross Sexual Imposition
Count 8: Kidnapping
Count 9: Gross Sexual Imposition
Count 10: Gross Sexual Imposition
Count 11: Disseminating Matter Harmful To Juveniles
Count 12: Kidnapping
Count 13: Gross Sexual Imposition
Count 14: Kidnapping
Count 15: Rape
Count 16: Corruption Of A Minor
Count 17: Kidnapping
Count 18: Gross Sexual Imposition
Count 19: Gross Sexual Imposition
Count 20: Felonious Sexual Penetration
Count 21: Endangering Children
Count 22: Kidnapping
Count 23: Gross Sexual Imposition
Count 24: Kidnapping

Count 25: Gross Sexual Imposition
Count 26: Gross Sexual Imposition
Count 27: Kidnapping
Count 28: Gross Sexual Imposition
Count 29: Gross Sexual Imposition

Although defendant originally entered not guilty pleas to all counts, on February 11, 2002, defendant changed his not guilty pleas to guilty pleas on some of the charges; the state nolled the remaining counts. Specifically, in case No. 01CR-02-705 (Franklin App. No. 03AP-385), defendant entered guilty pleas to the following: Counts 1 through 4 – Gross Sexual Imposition, felonies of the fourth degree, Counts 7 and 8 – Sexual Battery, felonies of the third degree, and Counts 9 and 10 – Gross Sexual Imposition, felonies of the fourth degree.

In case No. 01 CR-08-4353 (Franklin App. No. 03AP-381), defendant entered guilty pleas to the following: Counts 1 through 3 — Gross Sexual Imposition, felonies of the fourth degree, Counts 5 and 7 — Corruption of a Minor, felonies of the fourth degree, Count 8 — Disseminating Matters Harmful to Juveniles, a felony of the fifth degree, Counts 10 through 15 — Gross Sexual Imposition felonies of the third degree, Count 17 — Gross Sexual Imposition, a

felony of the third degree, Counts 19, 21, 23, and 25 — Corruption of a Minor, felonies of the fourth degree, Counts 26 through 31 — Gross Sexual Imposition, felonies of the fourth degree, Count 32 — Disseminating Materials Harmful to Juveniles, a felony of the fourth degree, and Count 34 — Disseminating Materials Harmful to Juveniles, a felony of the fifth degree.

In case No. 02CR-03-1721 (Franklin App. No. 03AP-388), defendant entered guilty pleas to the following: Counts 1, 2, and 3 — Gross Sexual Imposition, felonies of the fourth degree, Counts 5, 7, 9, 11, 13, 15, 17, and 19 — Corruption of a Minor, felonies of the third degree, all of which were to be sentenced under the law as it existed prior to Am.Sub.S.B. No.2 ("S.B.2"). In addition, defendant entered guilty pleas to Counts 21, 23, 25, 27, 28, 31, 33, 35, and 37 — nine counts of Corruption of a Minor, felonies of the fourth degree, all to be sentenced under the law as enacted through S.B. 2 and any pertinent amendments to it.

In case No. 02CR-03-1738 (Franklin App. No. 03AP-386), defendant entered guilty pleas to the following: Counts 2, 3, 5, 7, 25, and 26 — all Gross Sexual Imposition, felonies of the third degree, Counts 9, 10, 13, 18, 19, 23, 28, and 29 —

all Gross Sexual Imposition, felonies of the fourth degree, and Count 16 — Corruption of a Minor, a felony of the third degree.

The trial court requested a pre-sentence investigation and set the matter for a sentencing and sexual predator hearing, which the trial court held on March 31, 2003. By judgment entries filed April 3, 2003, the trial court sentenced defendant to a total of 20 years of imprisonment.

Exhibit K to Return of Writ. Represented by the same counsel, petitioner filed a timely appeal to the Tenth District Court of Appeals. He raised the following claims:

1. The trial court's imposition of consecutive sentences on defendant was not supported by the required findings pursuant to Revised Code 2929.14(E)(4) or the evidence and was error.

2. The trial court's imposition of sentence of more than the statutory minimum was not supported by the required findings pursuant to Revised Code 2929.14(B) or the evidence and was error.

3. The trial court erred in finding the defendant to be a sexual predator as the State did not establish by clear and convincing evidence that defendant was

likely to engage in the future in the commission of one or more sexually oriented offenses.

4. The trial court erred in filing a judgment entry in 01CR-705 that imposed a greater sentence than that pronounced at the sentencing hearing.

5. The trial court erred in filing a judgment entry in 02CR-1738 that imposed a greater sentence than that pronounced at the sentencing hearing.

6. The trial court deprived the defendant of due process when it utilized and relied on victim impact statements that were not made available to defendant or his counsel prior to or at the time of sentencing.

Exhibit I to Return of Writ. On December 18, 2003, the appellate court affirmed the judgment of the trial court, but sustained petitioner's fourth and fifth assignments of error, and modified judgment entries so that they accurately reflected the sentence imposed by the trial court. Exhibit K to Return of Writ. Still represented by counsel, petitioner filed a timely appeal to the Ohio Supreme Court. He asserted the following propositions of law:

1. In order to impose consecutive sentences, the trial court must make factual findings on the record (not simply

conclusions) in accordance with the provisions of 2929.14(E)(4) of the Ohio Revised Code.

2. The trial court's imposed imposition of sentences that are more than the statutory minimum were not supported by the required findings of fact pursuant to Revised Code Section 2929.14(B).

3. In order to be classified as a sexual predator, it must be found that by clear and convincing evidence that the perpetrator is likely to reoffend and commit future sexually oriented offenses.

4. Utilization of victim impact statements, which are confidential by nature, without prior notice to the Defendant or his counsel, that the Court has: a) received them; b) what their contents are; and c) attempt to use them to justify imposing greater sentences denies the Defendant of due process of law.

Exhibit L to Return of Writ. On May 12, 2004, the Ohio Supreme Court declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question.

On May 11, 2005, petitioner filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. He alleges that he is in the custody of

the respondent in violation of the Constitution of the United States based upon the following grounds:

> 1. The trial court's sentencing of petitioner to non-minimum and consecutive sentences, based on facts not found by a jury or admitted by him, violates petitioner's rights of due process and trial by jury contra the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.
>
> 2. Petitioner was denied his right to effective assistance of counsel in his direct appeal to the Franklin County Court of Appeals and to the Ohio Supreme Court, in violation of the Sixth and Fourteenth Amendment to the U.S. Constitution.
>
> 3. Petitioner was denied his rights of due process and confrontation when the court based its sentence on numerous out-of-court testimonial statements in violation of the Fifth, Sixth, and Fourteenth Amendment to the U.S. Constitution.

It is the position of the respondent that all of petitioner's claims are either procedurally defaulted, or barred due to petitioner's failure to fairly present his claims to the state courts.

II. EXHAUSTION: CLAIM TWO

Before a federal habeas court may grant relief, a state prisoner must exhaust his available remedies m the state courts. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). If a habeas petitioner has the right under state law to raise a claim by any available procedure, he has not exhausted that claim 25 U.S.C. §2254(b), (c). Moreover, a constitutional claim for relief must be presented to the state's highest court in order to satisfy the exhaustion requirement. *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). But where alternative state remedies are available to consider the same claim, exhaustion of one of these remedies is all that is necessary. *Keener v. Ridenour*, 594 F.2d 581, 584 (6th Cir. 1979). A habeas petitioner bears the burden of demonstrating that he has properly and fully exhausted his available state court remedies with respect to the claims be seeks to present for federal habeas review. *Prather v. Rees*, 822 F.2d 1418, 1420 n.3 (6th Cir. 1987).

Claim Two. In claim two, petitioner asserts that he was denied the effective assistance of appellate counsel because his attorney failed to raise on appeal an issue that his sentence violates *Blakely v. Washington*, *supra*, 542 U.S. at 296. This claim has never been presented to the state courts. Further, petitioner may still raise such claim in a delayed application to reopen the appeal pursuant to Ohio Appellate Rule 26(B):

> (B) Application for reopening
>
> (1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

Thus, claim two is unexhausted.

Respondent nonetheless contends that this Court should dismiss claim two as procedurally defaulted, because the claim is plainly without merit, and exhaustion of the claim by pursuit of a delayed 26(B) application would be futile. *Return of Writ*, at 15-16. However,

> [a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. §2254(b)(2). Further, where petitioner's federal constitutional claim is plainly meritless, "'and it would be a waste of time and judicial resources to require exhaustion,' nonexhaustion and procedural default should be excused." *Lyons v. Stovall*, 188 F.3d

327, 333 (6th Cir. 1999), quoting *Cain v. Redman*, 947 F.2d 817, 820 (6th Cir. 1991)(citing *Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987), and citing *Granberry v. Greer*, 481 U.S. 129, 131-32 (1987). Such are the circumstances here.

The right to counsel guaranteed by the Sixth Amendment is the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might e considered sound trial strategy." *Strickland*, 466 U.S.

at 689.

To establish prejudice, it must be shown that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.*, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*, at 697. Because petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, if the Court determines that petitioner has failed to satisfy one prong, it need not consider the other. *Strickland*, 466 U.S. at 697.

The *Strickland* test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). While appellate counsel is not expected to raise every nonfrivolous issue on direct appeal, counsel is obligated to provide reasonable professional judgment in presenting the appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). In order to succeed on an ineffective assistance of appellate counsel claim, a petitioner must demonstrate that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 696; *Sims v. Livesay*, 970 F.2d 1575, 1579-81 (6th Cir. 1992). Petitioner cannot meet this standard here.

Petitioner does not allege that his sentence exceeded the prescribed statutory maximum for the offenses of conviction. Thus, it does not appear from the record that his sentence violated *Apprendi v. New Jersey, supra*, as that case had been interpreted at the

time petitioner was sentenced.

> In *Blakely*, the Supreme Court reversed a sentence imposed under the State of Washington's determinate sentencing scheme after finding the trial judge had enhanced the defendant's kidnaping sentence beyond the statutory maximum based upon his own finding, by a preponderance of the evidence, the defendant had acted with "deliberate cruelty." 124 S.Ct. at 2537-38. In doing so, the Supreme Court reiterated its previous holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000), but clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S.Ct. at 2537 (emphasis in original).

United States v. Buchen, 134 Fed.Appx. 842, unpublished, 2005 Fed.App. 0431N (6th Cir. May 23, 2005). *Blakely* was decided on June 24, 2004, long after petitioner's appeal was filed and the state appellate court affirmed petitioner's convictions, on

December 12, 2003. Petitioner cannot establish the ineffective assistance of counsel due to his attorney's failure to predict the Supreme Court's decision in *Blakely*. *See United States v. Burgess*, 142 Fed.Appx. 232, unpublished 2005 Fed.App. 0531N (6th Cir. June 22, 2005)(no ineffective assistance for failing to anticipate *Blakely* or *Booker*).

> Competence, not prescience, is what the constitution requires. *See United States v. Bradley*, 400 F.3d 459, 463 (6th Cir. 2005) ("[W]here developments in the law later expand a right that a defendant has waived in a plea agreement, the change in law does not suddenly make the plea involuntary or unknowing or otherwise undo its binding nature. A valid plea agreement, after all, requires knowledge of existing rights, not clairvoyance."); *Green v. United States*, 65 F.3d 546, 551 (6th Cir.1995) (lawyers failure to predict Sixth Circuit's approach to law did not constitute ineffective assistance of counsel); *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1542(10th Cir. 1995)("Defendant faults his former counsel not for failing to find existing law, but for failing to predict future law. We agree ... that clairvoyance is not a required attribute of effective representation."); *Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir.1981) (holding that "Counsel is normally not expected to foresee future new developments in the

law").

Conley v. United States, 2005 WL 1420843 (W.D. Mich. June 15, 2005).

In view of all of the foregoing, claim two is without merit.

III. FAIR PRESENTMENT: CLAIMS ONE AND TWO

In order to exhaust available state remedies, a petitioner must first fairly present the substance of his federal habeas corpus claims to the state courts. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Anderson v. Harless,* 459 U.S. 4, 6 (1982). "The state courts must be provided with a fair opportunity to apply controlling legal principles to the facts bearing on petitioner's constitutional claims." *Sampson v. Love*, 782 F.2d 53, 55 (6th Cir. 1986). Petitioner does not fairly present his claim simply because the necessary facts supporting a federal constitutional claim are self-evident *Haggins v. Warden*, 715 F.2d 1050, 1054 (6th Cir. 1983) (citing *Harless*, 459 U.S. at 6). Furthermore. "[a] petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions employing constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns." *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir. 1993)(citing *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987)). Courts normally require more than a single broad generalization that petitioner was denied a "fair trial" or "due process of law." *Franklin*, 811 F.2d at 326; *Petrucelli v. Coombe*, 735 F.2d 684, 688 (6th Cir.

1984). Petitioner, however, need not "cite book and verse on the federal constitution." *Picard*, 404 U.S. at 277 (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1960)). The Sixth Circuit has strictly followed the requirement that petitioner fairly presented his federal constitutional claims to the state courts as a precondition to federal habeas review, *Weaver v. Foltz*, 888 F.2d 1097, 1098 (6th Cir. 1989).

Claims One and Three. As discussed, in claim one, petitioner asserts that his sentence violates *Blakely v. Washington, supra*, 542 U.S. at 296. In claim three, petitioner asserts that he was denied his right to confront witnesses, in violation of *Crawford v. Washington*, 541 U.S. 36 (2004), because the trial court considered victim impact statements and other out-of-court statements in imposing sentence. Petitioner argued to the state courts, however, solely that the imposition of consecutive sentences was not supported by required findings under O.R.C. §2929.14, and that imposition of a sentence greater than the statutory minimum likewise violated the requirements of O.R.C. §2929.14. Petitioner also argued that he was denied due process because the trial court relied on victim impact statements (petitioner did not refer to any other out-of-court statements) without first making such statements available to the defendant so that he would have an adequate opportunity to respond. *See* Exhibit I to Return of Writ. This Court is simply not persuaded by petitioner's argument that the foregoing arguments adequately preserved for federal habeas corpus review a claim under *Blakely*. As petitioner concedes, he neither cited to the federal Constitution, federal case law, nor any state cases

employing constitutional analysis in the state courts. *See Traverse*, at 3. Further, petitioner has failed to establish cause or prejudice for his failure to fairly present his federal constitutional claim to the state courts. Additionally, as noted by the respondent, claim three, in which petitioner asserts that the trial court improperly considered victim impact statements is, in any event, procedurally defaulted.

Duty to fairly present constitutional claims to the state courts. In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required fairly to present those claims to the highest court of the state for consideration. 28 U.S.C. §2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the claims, his petition is subject to dismissal for failure to exhaust state remedies. *Id.; Anderson v. Harless*, 459 U.S. 4, 6 (1982)(*per curiam*); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). If, because of a procedural default, the petitioner can no longer present his claims to a state court, he has also waived them for purposes of federal habeas review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 418, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 12, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is precluded by the petitioner's failure to

observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an 'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.* This "cause and prejudice" analysis also applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94 (6th Cir. 1985).

Claims presented to the Ohio courts. The state appellate court explicitly reviewed petitioner's claim that the trial court improperly considered victim impact statements for plain error only due to petitioner's failure to object at sentencing:

> Defendant's sixth assignment of error asserts the trial court deprived him of due process by relying on victim impact statements that were not made available to defendant or his counsel at the sentencing hearing.

The victim impact statements were first mentioned on March 31, 2003, the day of the sentencing and sexual predator hearing. At that time, the court noted that a pre-sentence investigation had been ordered, and the court had reviewed it. The court then inquired whether counsel had had an opportunity to see and review the pre-sentence investigation. Counsel for defendant responded that "as is typically the case. I was given the opportunity to review, I was not given access to the victim/witness impact statements nor, of course, the recommendation for the Court, but as far as the guts of the report, I have seen it and have reviewed it." (Tr. 49.)

At the conclusion of the state's evidence, the state sought the admission of exhibits, including the pre-sentence investigation. Defense counsel inquired whether the investigation included the victim impact statements and the recommendations of the probation department. Although the court indicated that its version did, the state said its exhibit did not. Defense counsel responded, "'[clause I've not seen any of that stuff." (Tr. 73.) The report was then admitted into evidence without objection. The witness statements came up later, when defense counsel again indicated he

had not seen them. At the time of sentencing, the court referenced the victim impact statements. Defendant did not object to the court's relying on them as part of the sentencing procedure.

R.C. 2947.051(C) provides that "[a] victim impact statement prepared under this section shall be kept confidential and is not a public record ***. However, the court may furnish copies of the statement to both the defendant or the defendant's counsel and the prosecuting attorney." One appellate district has rejected an argument similar to defendant's contentions and has determined a defendant is not denied due process or equal protection when a court exercises its discretion to deny the defendant access to victim impact statements. *State v. Stewart*, 149 Ohio App.3d 1, 6, 2002-Ohio-4124. We, however, need not reach that issue, as defendant's failure to object to the trial court's use of victim impact statements requires a plain error review. Because this record does not demonstrate plain error, defendant's contentions are not persuasive.

Specifically, Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *State v. Barnes*

(2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, the Ohio Supreme Court recently noted that "[b]y its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. *** Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. *** Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." (Citations omitted.) "Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court 'may' notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Id.*, quoting *State v. Long* (1978). 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

During the course of sentencing, the trial

court stated, "[s]o with all of these impacts in mind, the Court believes the sentencing – the Court considers the impacts on the victims under 2929.11 is significant." (Tr. 241.) Before so concluding, however, the trial court listed those aspects of the victim impact statements it believed to be significant and noted, "I have gone through the notes of the victim impact statements, made my own notes from them, just noticed such things, [B.P.] stating, who's now 17, 14 to 15 when these happened, nightmares, grades dropped from three point to 1.7, college plans got altered and changed, antidepressant meds, counseling for both [B.P.] and his mother, substance abuse problems." (Tr. 240.)

Similarly, as to another victim, the trial court stated "[K.W.] has the – has tried counseling and believed it was successful, had to move to father from mother, believes that all of this has been brought upon him by Defendant's conduct, feels very strongly about it. Sold prescription drugs, was expelled from school. *** [K.W.] said he's lost the ability to trust people." (Tr. 240, 241.) As to J.W., the court stated "it destroyed his family relationships. *** Those things are very deep and significant victim impacts." (Tr. 241.)

In a related vein, the trial court observed that T.R.'s relationship with defendant "*** was a life-altering relationship, dropped out of high school, actually – or got kicked out of high school as a result, turned to drugs, fear of bringing forth these events, shame of them, received incredible gifts from the Defendant as part of inducement to stay in the relationship. And as clearly stated, he will never be over it." (Tr. 240-241.) Similarly, as to B.D., the trial court stated B.D. "listed all the ways in which the Defendant induced him into the relationships. And he didn't tell his father because he was afraid that his father would go to prison for taking his vengeance out on the Defendant." *Id.*

At that point, the trial court stated "[s]o with all those impacts in mind, the Court believes the sentencing – the Court considers the impacts on the victims under 2929.11 is significant." *Id.* Because the trial court placed on the record those aspects of the victim impact statements on which it relied to impose its sentence, the court in effect advised defendant of the content of the statements, and it further gave defendant the opportunity to respond, if appropriate. As a result, defendant was not sentenced on the basis of victim impact statements whose content was unknown to him. Thus, the

> record does not reveal plain error arising from defendant's contentions that he was denied due process because he did not view the victim impact statements the trial court considered in sentencing defendant. Defendant's sixth assignment of error is overruled.

Exhibit I to Return of Writ.[1] Petitioner never argued to the state courts that the trial court had improperly considered any other evidence in imposing sentence. Further, petitioner may now no longer do so under Ohio's doctrine of res judicata. *See State v. Cole*, 2 Ohio St.3d 112 (1982); *State v. Ishmail*, 67 Ohio St.2d 16 (1981); *State v. Perry*, 10 Ohio St.2d 175 (1967). The Court therefore deems the first and second parts of the *Maupin* test to have been met. *See Gulertekin v. Timmelman-Cooper*, 340 F.3d 415, 423 (6th Cir. 2003), citing *Paproki v. Foltz*, 869 F.2d 281, 284 (6th Cir. 1989) and *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001).

The third requirement of *Maupin* is that the state procedural default is an adequate and independent ground foreclosing review of the federal constitutional claim. Ohio's contemporaneous objection rule is and adequate and independent state ground upon which to deny relief. The rule is stated in unmistakable terms, both in Ohio Criminal Rule 30(A) and in countless decisions. *See, e.g., State v. Landrum*,

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[1]Petitioner never argued to the state courts that the trial court had improperly considered any other evidence in imposing sentence.

53 Ohio St.3d 107, 111 (1990); *State v. Wade*, 53 Ohio St.2d 182, 188 (1978). The rule furthers important state interests in developing a record for appeal and, under certain circumstances, giving the trial judge an opportunity to correct an error at the earliest possible opportunity. Finally, the rule is independent of federal law. Likewise, the requirement that all claims be asserted at the first opportunity serves the state's interests in finality and in ensuring that claims are adjudicated at the earliest possible opportunity. The doctrine of res judicata is stated in unmistakable terms in numerous Ohio decisions and Ohio courts have consistently refused to review claims on the merits under that doctrine. *See State v. Cole*, *supra*; *State v. Ishmail, supra; State v. Perry, supra.*

Petitioner can still secure review of his claim on the merits if he demonstrates cause for his failure to follow the state procedural rules, as well as actual prejudice from the constitutional violation that he alleges. Petitioner has failed to demonstrate either cause for his procedural default of claim three or actual prejudice resulting from the alleged constitutional violation.

Beyond the four-part *Maupin* analysis, this Court is required to consider whether this is "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. at 491; *see also Sawyer v. Whitley*, 505 U.S. 333. After review of the record, the Court does not deem this to be such a case.

IV.

For all of the foregoing reasons, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED**.

If any party objects to this *Report and Recommendation*, that party may, within ten (10) days of the date of this report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate Judge with instructions. 28 U.S.C. §636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Mark R. Abel
United States Magistrate Judge